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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.

T. J. Wills,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. John B. Edmonsen, by and through her attorneys, prays that a Writ of Certiorari issue to the Circuit Court of Appeals for 5th Circuit directing it to send up the record in the above entitled cause to be reviewed by this Court and such order entered therein as my appear from the record in the case to be meet and proper.

II

Jurisdiction

The jurisdiction of this Court is invoked and a review sought under the provisions of the statutes and rules of this court governing the granting of Writs of Certiorari.

A. The provisions of Section 240 of the Judicial Code, as amended, Section 347, Title 28, U. S. C. A.

B. The provisions of Rule 38 of this Court.

(5) (b) In that the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. (Title 40—U. S. C. A., section 407.)

(c) And has so far departed from the accepted and usual course of Judicial proceedings as to call for an exercise of this Court's power of supervision. (In that it has set aside the finding of facts of the District Court and the decree entered thereon, where there was no manifest error on the part of the District Court in making the finding of fact and no substantial facts in the record to base the finding made by the Circuit Court of Appeals.)

(d) And has decided a Federal question in a way probably in conflict with applicable decisions of this Court. (Section 67(d) (6) of the Bankruptcy Act. Being the uniform fraudulent conveyance act known as, and designated as, the Chandler Act.)

C. The Circuit Court of Appeals has reversed the finding of facts made by the District Court in conflict with and in breach of the provisions of Rule 52 of the Rules of Civil Procedure, and this Court is respectfully petitioned to set aside said finding of the Circuit Court of Appeals.

III

Case History

We will state the case as briefly as we can to make it clear.

Under date of January 11, 1940, F. T. Newton and F. S. Glenn formed a partnership agreement. On the 21st of July, 1941, Newton and Glenn entered into a general part-

nership contract. Under date of February 15, 1942, Glenn entered into a partnership agreement with his wife, his son and his daughter in which he gave to them a one-fourth interest in his one-third interest in the Newton and Glenn partnership. This was a sub-partnership agreement. This contract was placed of record at Hattiesburg, Mississippi, the home of Newton and Glenn.

Newton & Glenn bid on the Camp Campbell housing project at Clarksville, Tennessee, and was awarded the contract on March 27, 1942.

On April 6, 1942, Newton took into partnership with him six members of his family, making each responsible for the furnishing of capital with which to perform the contract and giving to each a one-seventh interest in the profits derived and a like amount of any liability in any losses that might be sustained (Record, page 292).

This contract was placed of record in the Chancery Clerk's office at Hattiesburg, Mississippi. The contract so entered into was limited to the Camp Campbell project and admitted the six persons executing the contract into the partnership with Newton in his interest in the Newton & Glenn contract. These parties had no interest whatsoever in Glenn's one-third interest in the partnership contract and had no power of control in the execution of the contract except through Newton, who was a member of the prime partnership with whom the government agency had negotiated and awarded the contract for the erection of the housing project.

A like contract was entered into in June, 1942, for the Greenville, Mississippi, Air Base by Newton with the same six members of his family. In August, 1942, a like contract was entered into between Newton and the petitioner herein, Mrs. John B. Edmonson, and her husband, for a Recreation Center at Rohwer, Arkansas, whereby they took a one-

third interest, each, in Newton's two-thirds interest in the contract (Record, page 292, *et sequa.*).

The contracts were performed and each one of the contracts resulted in a profit. Neither Newton nor any one of the six sub-partners put up any money for the construction of the contracts. Two of the contracts were assigned under the statute to the Union & Planters National Bank & Trust Company of Memphis, Tennessee, and the third one to the Deposit Guaranty Bank and Trust Company of Jackson, Mississippi. These three contracts resulted in large profits.

Newton & Glenn, as partners, and in their partnership capacity bid in eight contracts for the construction of housing projects with the United States Government or the Housing Authorities.

On March 1, 1943, Newton & Glenn dissolved their partnership which embraced the aforementioned eight projects. Glenn had withdrawn in excess of $40,000.00 and Newton paid him in cash $80,000.00 more as his interest in the eight contracts. On record, page 795, it is shown that the Bank after taking from the Camp Campbell contract $33,000.00 for the debts of F. T. Newton and $122,000.00 for the debts of Newton & Glenn, having reimbursed itself $945,000.00 advanced on these projects, with which the construction work was accomplished, paid to Newton & Glenn, or F. T. Newton, since Glenn was out of the contracts, the sum of $220,000.00.

On the same page in the record it is shown that the Bank advanced $415,000.00 on the Rohwer, Arkansas project, and after repaying this sum of money and applying $60,000.00 to Newton & Glenn's debts gave to Newton or deposited to his account $57,800.00. The record also shows that the Greenville Air Base made a profit of $141,660.00, which money was paid to Newton in cash by the Jackson, Missis-

sippi, Bank on the assignment of a contract under the provisions of a Federal Statute.

The accounts were audited by a C. P. A., and on August 15, 1943, he filed his audit showing that the profits accruing to petitioner herein were $52,049.79, and a like sum of money representing profits accrued to petitioner's husband, making a total of $104,099.58 due thereon. This petitioner sought to get a distribution of her and her husband's profits. Newton induced them to accept a deed from him and his wife to certain properties, a large portion of which was slum properties in the City of Hattiesburg. There was $85,000.00 in mortgages on the property, for which petitioner assumed the payment and liquidated the $104,000.00 to her and her husband as profits accruing on the three projects in which they were sub-partners. This deed was executed on the 23rd day of August, 1943, and placed of record October 6, 1943.

Newton & Glenn, as a partnership, took their last contract on December 21, 1942, making eight contracts awarded to the partnership of Newton & Glenn. It will be observed, however, that Newton did not take his relatives into a sub-partnership in any other contracts than the three mentioned. They were the first, second and third contracts awarded to Newton & Glenn by the United States Government. It is shown on page 805 of the record that the Bank at Memphis advanced on the assignment of seven of these contracts $4,175,000.00. That it received back from the government that applied to the purchase price of the assigned contracts $4,402,460.00. Reference has been made to page 795 where the Executive Vice President of the Bank showed that he had paid to Newton $462,119.00 in cash from the three contracts in which petitioner herein was a partner. None of this money, however, was paid to the partners with Newton, sub-partners in the Government contracts as their profits accruing from the construction of the projects.

After Newton & Glenn dissolved partnership Newton traveled alone in the contract business. He was successful in bidding in nineteen contracts the next year, 1943.

IV

The Attack on the Property Transfer

Title 40, U. S. C. A., Section 407, provided for the assignments of the contracts awarded by the United States government and its agencies. On July 5, 1943, Newton took a contract with the F. P. H. A. for the construction of a housing project at Brunswick, Georgia. The contract price was in excess of $2,900,000.00. Newton had taken these contracts with the Government and had assigned each and every contract to the Memphis Bank. The proper construction of the Act of Congress would have given Newton the contract value less the Bank's discount and the money would have been paid over to him contemporaneously with the assignment. This statute, however, has not been construed so far as we are able to learn, and it ought to be construed by this court.

The Bank took the assignment and then as a matter of accounting notes for the money advanced on the assigned value. As Newton needed the money he would sign a note and they would then place to his credit a portion of the contract value that had been assigned to it. The repayment was guaranteed by the United States Government.

As the work progressed monthly estimates of completed work and material placed on the project was made by the contractor, approved by the Engineer in charge, and submitted for payment. It was the rule of the government in making the settlement to retain 10% designated as retainage to be paid on the completion of the project. Newton's nineteen projects were running along contemporaneously and a retainage of ten per cent on each project was being

made. So that of the $7,000,000.00 approximately of contracts that Newton as an individual had when completed would have a retainage of $700,000.00. In addition to this retainage the Government's payment was always thirty days or more behind the expenditure of money advanced in the performing of the contract. This caused from $1,000,000.00 to $1,500,000.00 of completed value in suspense. If the Act of Congress is to be construed that Newton owed this money, it would appear that he owed the Bank that amount of money. However, if the statute is construed that when the contract value was assigned that it was an obligation of the Government to pay, then Newton would owe no money to the bank. If there was a delay in completing the job for any appreciable period of time it would show a greater spread between the money advanced by the Bank and the money refunded to the Bank by the government. Labor shortage usually does and in this instance did result in some delays.

When the Bank discovered on the 16th of October, 1943 that Newton had conveyed this property to petitioner in settlement of her part of the profits made on the three projects in which she and her husband were sub-partners it refused to put up more money. It had the assignment of $2,900,000.00 of the F. P. H. A. job and the record shows that it had only put up $1,400,000.00. It had a $1,500,000.00 in the retainage on the Brunswick job. On the nineteen contracts and the necessary delay between the advancement of the money with which to do the construction work and the approval by the government engineers of the finished work for payment was great. So the Bank's assertion that Newton owed it $1,500,000.00 was made when he did not owe them a dollar. This depended upon the construction of Section 407, Title 40, U. S. C. A.

V

The Title of Petitioner to the Property Was Attacked

A petition in Bankruptcy was filed against Newton on the 3rd day of November, 1943. On November 5, 1943, a petition was filed to set aside the deed to this petitioner as having been executed with a fraudulent intent to hinder and delay Newton's creditors.

This case was tried before the District Judge. He had previously adjudicated Newton a bankrupt after setting aside a verdict of a jury that was rendered in his favor, on the ground that in making the deed Newton intended to defraud his creditors. In the trial of this case the Court held that there was no fraudulent intent on the part of this petitioner to hinder or delay Newton's creditors or to defraud them in any way. That her action in accepting the conveyance was for a valuable consideration without any fraudulent intent whatsoever. The court held, however, that the price paid for the property was not its fair and equitable value. That petitioner was not entitled to hold the property, but that she was entitled to her money and entitled to retain the property until she was reimbursed. The Court directed that on reimbursement of her money that she would make a deed therefor to Newton's trustee in bankruptcy.

The District Judge in finding the facts based it upon the ground that there had been nothing to indicate to this petitioner or that the Bank would refuse to put up the remaining money to complete the contracts. The Court followed the provisions of the Chandler Act which adopted a Federal Uniform Fraudulent Conveyance Act for all Bankruptcy proceedings. (Section 67(d) (6) of the Bankruptcy Act, Section 107, Title 11, U. S. C. A.)

The Circuit Court of Appeals without citing authorities

or referring to any testimony to support its action set aside and invalidated the finding of fact by the District Judge. It refused to be controlled or even concerned over the provisions of Section 407, Title 40, U. S. C. A. It declined to apply Section 67 (d) (6) of the Bankruptcy Act, commonly referred to as the Chandler Act.

The Circuit Court of Appeals was not persuaded to give effect to Rule 52 of the Civil Rules of Procedure or the Act of Congress, or to give potency to the finding of fact by the District Judge, who had an opportunity to observe the witnesses as they testified. The finding of the District Court is Appendix A and the opinion of the C. C. A. is made Appendix B hereto.

Summary

The District Judge held that the contract of partnership was a good and valid sub-partnership.

The C. C. A. reversed this finding with no evidence to warrant it in so doing. The Appellate Court held that the agreement was without consideration. Each sub-partner had a one-seventh interest in Newton's two-third interest. This interest was assigned to the Bank with the interest of all others and hereby procured all the money used in the construction of the project. They bound themselves by a promise for a promise.

The District Court held that the interest of Petitioner was $52,049.78. The record for both litigants shows that she had this amount proven. The Appellate Court overruled the District Court without any basis for so doing.

The District Court held that there was no fraud or fraudulent intent on the Petitioner. The Appellate Court held that acts of other persons interested in the Newton affairs committed months after this conveyance proved that the sub-partnership agreement was entered into with fraud-

ulent intent. This was such a departure from accepted judicial procedure as to call for a review by this Court.

The District Court gave effect to Title 40 U. S. C. A., paragraph 407. The Appellate Court departed from the principles established by said Act.

The District Court followed. Section 67(d) (6) of the Bankrupt Act. The Appellate Court held it does not apply.

We respectfully submit to this Court that the opinion of the Circuit Court of Appeals is in error. That its failure to give effect to the Acts of Congress herein referred to places this case in the class with those that this Court will order certified up for review. That this case should be ordered up by Writ of Certiorari and the action of the Circuit Court of Appeals should be reversed with directions.

T. J. Wills,
Sol. for Petitioner.

The partnership of Newton & Glenn was awarded its first government contract on March 27, 1942. This was the Camp Campbell, Tennessee, one.

On April 6, 1942, Newton took into partnership agreement his six relatives, in which he gave to each a one-seventh interest in his two-thirds interest in this contract so awarded them. This contract appears in this record, pages 216-221, inclusive. On June 4, 1942, this contract was placed of record on the land deed records in Hattiesburg, Forrest County, Mississippi. The contract provided for each one of the parties to share for the capital invested, equally, in the two-thirds interest of the said F. T. Newton in said contract; that each one should share equally in the profits that accrued or the losses that might be sustained by virtue of the contract.

This contract was a sub-partnership one. The District Judge so found. His finding was correct, see

47 Corpus Juris, Pages 715;
40 American Jurisprudence 135;
American English Encyclopedia of Law (2nd Edition) 17.

In placing this contract on record it gave notice to the world of its existence and what were its terms.

The Circuit Court of Appeals set aside the District Court's finding without any evidence to sustain its action. Its action in so doing violates the acts of Congress and is in conflict with Rule 52 of Civil Procedure.

Neither Newton nor Glenn had the money with which to perform the contract. Four days after the contract between Newton and his six relatives was entered into he assigned the entire contract to the Union Planters National Bank & Trust Company of Memphis, Tennessee.

This assignment was made of the entire contract value, which is shown to be $1,332,418.52. The Bank accepted the assignment and advanced the money necessary for the construction of the contract. The amount advanced was $945,000.00. There was a profit of $376,566.07. The bank applied $33,368.75 to other debts of Newton and $122,618.95 to the debts of Newton & Glenn, and gave to Newton by placing to his deposit account the sum of $220,578.37. (See record, page 795).

The District Judge found this fact from the evidence. The C. C. A. set aside his finding without any evidence to support its findings.

There were partnership agreements, as shown by the record, as to the Greenville, Mississippi, contract and the contract for the project at Rohwer, Arkansas. On page 795 of the record it will be seen that as to the Rohwer, Arkansas, project there was deposited to Newton's deposit account, which was a payment in cash, $57,800.00. The Greenville, Mississippi, contract was financed by the Deposit Guaranty Bank & Trust Company of Jackson, Mississippi, and it is shown on page 92 of this record that the net profit to Newton on the Greenville, Mississippi, contract totaled $141,660.18.

We invite the Court's attention to the fact that this money was paid to Newton by the Bank. The sub-partnership agreement provided that he was to be the agent of all the sub-partners in obtaining the money, in managing the construction of the project and the handling of the affairs generally.

The profits so made gave to each of the sub-partners $52,049.79.

On March 1, 1943, Newton & Glenn dissolved their partnership. Glenn had withdrawn $40,000 from the business and Newton paid him $80,000.00 more, making $120,000.00 that he took out of the partnership business.

Newton & Glenn, as partners, had taken and performed eight contracts for the Federal government. Each and every contract value had been assigned to the Union & Planters National Bank & Trust Company of Memphis, Tennessee, except the Greenville, Mississippi, project, which was assigned to the Jackson, Mississippi, Bank.

The partnership agreement between Newton and his relatives only extended to the first, second and third contracts entered into with the Government. Each one carried with it a separate partnership agreement as to the individual project under construction.

Newton claimed to his sub-partners that he had not had the accounts of the three projects audited, but as soon as they were audited he would give them their share of the money. We call the Court's attention specially to the fact that the Bank had already paid Newton the profits derived from these three contracts. Newton in turn had settled with Glenn, the prime partner in the partnership of Newton & Glenn.

On August 15, 1943, R. G. Wooten, C. P. A., completed the audit of the three projects in which the six Newton relatives were sub-partners showing the sum of $52,049.79 due each one. Combining the amount due Mrs. Edmonson, the petitioner herein, with that of her husband make the amount due them $104,099.58.

After these contracts had been performed and the money had been paid to the bank and by the bank distributed to Newton, Newton & Glenn dissolved their partnership. Thereafter Newton took contracts in his own name under the trade name of "Newton Construction Company". The contracts so taken had no connection whatever with the Newton & Glenn contracts, or the three contracts in which Newton had his relatives as sub-partners with him.

As above stated, Newton & Glenn had eight contracts with the government. Newton and his six relatives were

sub-partners in three, being the first, second and third contracts awarded to Newton & Glenn. The Newton & Glenn contracts were completed. This record discloses (page 805) that of the eight Newton & Glenn contracts one of them was assigned to the Jackson, Mississippi, bank and made a profit of $141,660.00 And the other seven, aggregating $4,429,165.45, were assigned to the Union & Planters National Bank & Trust Company of Memphis. The Memphis Bank advanced on the assignment so made the sum of $4,175,000.00 and received back from the government $4,402,460.64. This was $227,000.00 more than the Bank had advanced, on and, as the purchase price of the contracts assigned. The record shows that all of the money necessary to perform these contracts was advanced by the bank.

Newton was due to make distribution of the profits at the time that he received the cash from the bank that accrued to the three contracts in which the sub-partnership existed. He had not done so, however, and on August 15, 1943, when the audit was finally made of these contracts he had the other nineteen contracts that he himself had taken with the government in 1943 under construction. Newton induced petitioner herein and her husband to accept title to the rental properties that he had in Hattiesburg and to pay the $85,000.00 mortgage on said property in lieu of the said money coming to them as their profits in the partnership agreement.

The agreement between Newton and the six members of his family, above referred to, is a sub-partnership agreement. The profits derived therefrom was not a debt that Newton owed to the sub-partners, but bore the same relationship as the partnership profits in any other ordinary partnership relation.

The District held that the profits of Petitioner and her husband was $104,099.58. The C. C. A. without a con-

tradictory word of evidence held that the burden had not been met in proving these profits.

There was no rushing of the deed for record or haste with respect to taking possession and beginning the collection of rents. The transaction continued to move in the ordinary and usual way. The deed was placed of record on October 6, 1943, and the rentals began to be collected as of October 1, 1943, in accordance with the agreement made when the transfer contract was entered into.

Section 407—Title 40—U. S. C. A., provides in paragraph (a) that with the written consent of the sureties and the approval of the contracting agency of the government, that the contractor may assign the entire contract value of a governmental contract to a bank. This record shows that in each and every case Newton had assigned the contracts to the Memphis Bank. All of the Newton & Glenn contracts, with the exception of one, was assigned to the same Memphis Bank. Less than thirty days before this conveyance was made, the largest contract awarded to Newton was awarded to the Brunswick, Georgia, Housing Project. This contract was with the F. P. H. A. and was for just a little less than $3,000,000.00. In less than thirty days time this contract was assigned to the Memphis Bank, and at the time the deed of conveyance and settlement was made with the petitioner herein the Bank had advanced only $150,000.00 on the almost $8,000,000.00 assigned value.

When this assignment was made to the bank it passed the title of the contract to the Bank. The contractor had a performance bond and a payment bond executed in accordance with the provisions of Section 270 (a) and 270 (b), Title 40—U. S. C. A. The government was taking no chances in allowing this assignment to be made, because if the contractor failed to carry out his contract and to pay for it. The bonding company was a company that had

been approved by the contracting agency, otherwise the contract would not have been awarded.

The Act of Congress contemplated that the entire contract value, less a banking discount, would be made available immediately on the assignment to the Bank by the Contractor.

Paragraph (b) of the Section provided that this money when given to the Contractor by the Bank was a trust fund and it outlined how he could expend it.

Paragraph (c) of the Section provides that the Bank will not be obligated in any way to see that the funds were properly expended. The entire responsibility rested upon the contractor and the sureties on his performance and payment bonds.

This Act of Congress has not been construed by this Court, but should be under a proper construction of the act the money advanced is not a charge against the contractor but the obligation of the Government. This will put the Bank in default. Newton would never owe the Bank. He would either perform or the Bonding Company would be called on and Newton would owe it. The claim that Newton owed the Bank is without foundation in fact or law.

As each contract was performed monthly estimates of the completed work was made by the contractor, checked and approved by the Government Engineer and forwarded to the proper office for payment.

The money advanced on the assignment by the Bank had already been expended to that amount in the purchase of material and construction of the project. The government in making installment payments retained ten percent. This retainage was not paid until the contract was completed and accepted by the Government Engineer in charge.

On account of this handling the spread between the

amount advanced by the Bank to the contractor and spent in the prosecution of the work and the amount refunded to the Bank by the Government increased on each estimate made and approved for payment.

It appears that the Bank got panicky because of the amount of the difference in the monies advanced and the government payments made.

On the 16th of October, 1943, the spread was approximately $1,500,000.00, accepting the Bank's figures. This represented the ten percent retainage and the expenditures going into contractor's estimates for which government checks had not been issued to the bank. The Bank refused to advance more money and Newton was unable, as a result thereof, to meet his payroll. The Government in protecting organized labor inserted in the contract that default in payment of the labor would be grounds for the cancellation of the contract and the taking of it over to be completed otherwise. The failure to advance the $225,000.00 needed as of October 16, 1943, resulted in the cancellation of the contracts. It is shown that seventeen of the contracts had been more than ninety-five percent completed. So that in each one ten percent of ninety-five percent of the contract value was tied up in government retainage. $480,000.00 of the Bank's money was tied up in Brunswick, Georgia, contract, on which an estimate on that day should have gone in and a government check sent to the Bank in payment thereof.

In support of this statement we call the Court's attention to the testimony of Mr. Wilson, Executive Vice President of the Bank, where it appears on page 793, where the bonding company enjoined the payment to the Bank of this check that should have gone in on that day in the sum of $477,411.46.

The Bank's claim that Newton owed to the Bank on October 16, 1943, $1,531,171.89 was arrived at by subtract-

ing the amount collected from the government through October 16, 1943, from the amount that the Bank had advanced on all of the contracts. At the middle of page 809, under Exhibit #3 to Wilson's testimony, it stated that the amount paid to the assignor was $9,890,490.23, and that the collections from the government through October 16, 1943, was $8,359,318.34, leaving a balance due by the assignor to the Bank of $1,531,171.89. Now, this spread between the amount that the government had refunded to the bank doesn't represent that a single dollar of the money was owed by the assignor to the Bank.

Senator Walsh introduced in the Senate to President Roosevelt's Recovery Act the amendment which when passed became Section 407, Title 40, U.S.C.A. The discussion shows that it was the intention of the amendment of giving to the Banks the authority to accept the assignments from the contractors of Public Works jobs. That all the Bank had to do was to advance the contract value so assigned, less the reasonable discount, and then await the refund of its money from the government. But, for this Act, the President's recovery legislation would have been of no avail. This Court has not passed on nor interpreted this Act.

The Circuit Court of Appeals in its opinion in this case said that Newton owed the Bank more than $1,500,000.00. In our petition for a rehearing we challenged this, but the Court turned a deaf ear. At the time the Bank refused to advance the money, it had $2,033,000.00 of unexpended contract value assigned to it. Newton needed a large percentage of that amount to complete the contracts, but with his contract value assigned he couldn't raise the money elsewhere. It was the duty of the Bank to advance it, and if the interpretation of the Circuit Court of Appeals is allowed to stand, then, that Congressional Enactment that sheds luster on the name of Senator Walsh, President

Roosevelt and the Congress in pulling us out of the depression became a booby trap to blow the feet off of the contractors, who find themselves in the hands of unwise bank officials. We think that this Court should take jurisdiction of this case and hold that when the Bank accepted the assignment it was under contract with the government to put up this money to the amount of the contract price for the completion of these public contracts.

The District Judge saw this, and we call the Court's attention to his statement of facts in his opinion in this case. Of course, the District Court didn't go as strong as he should have gone. He didn't go as strong as this Court will go. It was a task indeed to have the purpose and effect of this legislation understood. However, the petitioner here accepted the District Judge's findings without challenge.

Petitioner was anxious to get her money. She took the property tendered her. She didn't think that she was getting more than was coming to her. The property was assessed at $170,000.00 on the assessment rolls for taxes. She was paying $189,000.00. She had no intention to defraud Newton's creditors. To have had such an intention she would have had to have been a soothsayer with ability to foretell that the Bank was going to breach its agreement with the government to put up this money and hereby put Newton into difficulties. That is what the District Judge found the facts to be. The Circuit Court of Appeals has spoken in its opinion as if the sub-partnership agreement was covered with ignomy. It differed with the District Judge by refusing to see the facts. His statement is true and correct. The statement of the Circuit Court of Appeals contains the error.

The Circuit Court of Appeals in construing the Chandler Act, Section 67 (d) (6) of the Bankrupt Act, said that it had no application to a case of this kind. The Chandler Act, amending the Bankruptcy Act, has made a general Fraudu-

lent Conveyance Act to be enforced alike in every state of the union. No other Fraudulent Conveyance Acts are applicable to Bankrupt cases. It makes the length of time twelve months in which the Bankrupt Court can reach out and draw unto itself property that has passed from the Bankrupt at less than its fair equivalent value. While it can do that, the Congress has said that if the grantees in the conveyance had paid a valuable consideration without intent to hinder and defraud the creditors, that they should receive their money back.

The Court's statement that the Act does not apply to a case like this is deciding the case contrary to the plain intent of the statute and probable in conflict with the applicable decisions of this Court.

The Circuit Court of Appeals set aside the finding of fact made by the District Court in violation of Rule 52 of the Rules of this Court and the statute made and provided.

There were many conflicts in the testimony. However, the language of this Court in *Schreyer* v. *Platt* is a complete answer to the attack thereon, the Court said:

> "It is objected by the appellees that Schreyer's testimony is not to be depended upon, because contradictory, confused, and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent after the conveyances were deposited by Schreyer in his own name, in bank, and were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands. But does all this indicate fraud? If his testimony is worthless, and to be rejected, then there is practically no testimony interpreting those transactions; and the court never presumes fraud. The very confusion and carelessness int he dealings between husband and wife make against, rather than in favor of, the claim of fraud."

Schreyer *v.* Platt, 134 U. S. 405, 10 Supt. Ct. Rep. 579.

We respectfully submit that this Court should take jurisdiction, grant certiorari, and on review reverse the C.C.A. and reinstate the finding of facts and Decree of the District Court.

Respectfully submitted,

T. J. Wills,
Sol. for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

Gulfport, Mississippi, August 28, 1946.

Chambers of Sidney C. Mize, District Judge; Honorable T. J. Wills, Hattiesburg, Mississippi; Honorable M. M. Roberts, Hattiesburg, Mississippi; Honorable T. C. Hannah, Hattiesburg, Mississippi; Messrs. Watkins & Eager, Standard Life Building, Jackson, Mississippi.

Gentlemen:

I herewith enclose you copy of an opinion I am today signing in the *Newton* case. As you will note I am of the opinion that the sub-partnership was legal under the authorities cited. And that since there was a profit in each one of these partnerships, the Edmonsons were entitled to their share of $104,000.00 but that this was not an adequate consideration for the property conveyed and that therefore, the conveyances will be set aside upon the plaintiff paying the Edmonsons the sum of $104,000.00.

I have given your briefs and the record much study and consideration and must confess that the problem is a difficult one, but after studying it carefully I am thoroughly convinced that the Edmonsons meant no fraud when they entered into the transaction and I do not believe that on the 23rd day of August, or the 6th of October, that Newton know how he stood economically but had begun to be fearful that his status was not good at that time.

I have detailed somewhat at length in my opinion the facts as I found them and you gentlemen may propose a formal finding in accord with the opinion if you so desire.

With kindest regards to all of you, I am

Sincerely,

(S.) S. C. Mize.

No. 232

G. M. McWilliams, *Trustee,*

vs.

F. T. Newton, et al.

This is a suit instituted by the Maryland Casualty Company, et al., for the purpose of setting aside certain conveyances alleged to have been made for the purpose of defrauding creditors; thereafter, F. T. Newton and Mrs. F. T. Newton were adjudged bankrupts, and G. M. McWilliams, Trustee in Bankruptcy, was substituted as plaintiff. The suit was instituted November 5, 1943, and thereafter a supplemental pleading was filed, and since that time the Trustee in Bankruptcy had adopted the pleadings and seeks the relief originally sought by the other plaintiffs.

The conveyances that are attached are dated August 23, 1943, and were executed by F. T. Newton and Mrs. F. T. Newton to Mrs. John B. Edmonson. In addition to the deeds sought to be set aside in an assignment of a certain note and deed of trust executed by Tommy B. Sims to the Newtons, the assignment having been dated September 2, 1943. All of these documents were filed for record in the office of the Chancery Clerk of Forrest County, October 6, 1943. The value of the property conveyed by Newtons to Edmonson was approximately $450,000.00.

Prior to August 23, 1943, Newton and Glenn had been awarded contracts by the Government for the construction of twenty-six Government projects scattered over six states, and the total amounts to be paid for the construction of these projects was approximately $11,000,000.00. Among others were the contracts known as the Camp Campbell contracts in Clarksville, Tennessee, which were awarded by the Government on August 10, 1942, to Newton and Glenn at Rohwer, Arkansas, at and for the sum of $521,045.95. Another one involved herein was the project known as the Greenville, Mississippi, job. In the partnership between Newton and Glenn in the above three projects Newton was interested to the extent of two-thirds and Glenn to the extent of one-third. All the contracts that were taken by the partnership of

Newton and Glenn were assigned to the Planters Bank of Memphis, with the exception of the Greenville, Mississippi, contract. In the Greenville project the Memphis Bank had fifty per cent participation. On March 1, 1943, Glenn sold his entire interest to Newton in all the contracts held by them for the sum of $80,000.00, and the Memphis Bank advanced this sum of money to Newton with which to pay Glenn, and Newton agreed to assume and pay off all of the partnership debts that were owing on that date and Mrs. F. T. Newton guaranteed the payment of the debts.

After the purchase by Newton of the interest of Glenn, Newton procured nineteen of the contracts, totaling the twenty-six. After Newton and Glenn procured the Camp Campbell contract and the Rohwer, Arkansas, contract and the Greenville, Mississippi, contract, Newton entered into a sub-contract with John B. Edmonson and Mrs. John B. Edmonson as to his two-thirds interest in each of these contracts (by the terms of which the Edmonsons were to share in the Camp Campbell contract one-seventh of the profits or losses in Newton's two-thirds interest therein, and a like agreement as to the Greenville contract and to share one-third of the profits or losses of Newton's two-thirds interest in the Rohwer, Arkansas, job).

In August, 1943, Newton's books and records were many months behind and were not properly posted, and he did not know financially just what his condition was. In September and the early part of October he was in conference with the bank officials in Memphis, Tennessee, and advised them that he did not know what his economic status was. He represented to the officials of the bank that he owed sub-contractors approximately $140,000.00, but it later developed as of October 15, 1943, that he owed more than $600,000.00 to sub-contractors. Up until this time Newton probably did not know whether he was solvent or insolvent, but as a matter of fact he was then on October 16, 1943, insolvent.

The Camp Campbell contract and the Greenville contract and the Rohwer, Arkansas, contract were approximately ninety-five per cent complete on August 23, 1943, and each of the projects was profitable. This was shown by an audit of Wooten completed about the 15th of August and

given to Newton. Newton at that time had no thought other than that he was solvent. Under the agreement with the Edmonsons their share of the profits in the three projects amounted to $52,000.00 each, or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson with the consent of her husband Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his conduct and actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00 he concluded to convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and they were acting in good faith at that time. The deed was executed August 23, 1943, and was filed for record October 6, 1943. Between August 23, 1943, and October 16, 1943, Newton was having difficulty in meeting his payroll and was having conferences with the bank officials. On October 16, 1943, the bank declined to advance any further money for meeting the payrolls unless Newton would give additional security to the bank. Newton declined to do this; thereupon the bank refused to advance any money, and soon thereafter Newton defaulted and the Government took over the contracts to be completed. The remaining contracts were completed, leaving Newton owing creditors to the extent of approximately $2,000,000.00.

The contract for the work at Brunswick, Georgia, was for $2,869,989.00 and was awarded July 24, 1943, approximately one month before the date of the conveyances. This contract, like the others, was assigned to the Memphis Bank and at the time that Newton made the deeds to the Edmonsons in August, the bank had advanced approximately $150,000.00 on this Brunswick project. As late as July 25, 1943, the bank was urging Newton to keep in behind the engineers and have their estimates go forward so that the government checks would come into the bank. At this date it is not believed that Newton had any thought of being insolvent, and not until some time about the early part

of October did the bank feel its insecurity. It had advanced at the time of the default about $2,033,151.64. The bank on that date declined to advance the payroll, and of course, the default followed. The contracts held by Newton and by Newton and by Glenn then undertook to do everything he could to hide, secrete, divert, and transfer any monies, bonds or properties that he possessed, and thereafter from time to time shifted it from one place to another and was hopelessly insolvent.

The question presented by this record is what were the rights of the Edmonsons as of August 23, 1943, by virtue of a conveyance made on that date and recorded on October 6th. The rights of the Edmonsons grew out of the three contracts with the Newtons, one of which was dated April 6, 1942, and recorded in the office of the Chancery Clerk of Forrest County on the 8th of June, 1942, and the second contract dated June, 1942, and the third contract dated August, 1942, and all of same being similar, and which contracts are found at page 575 et seq. These documents purported to form a sub-partnership, into which said sub-partnership none of the parties contributed any actual capital. Newton himself contributed no capital, but Newton was contractor and had valuable equipment with which he and Glenn as partners were to perform these various contracts with the Government. The Edmonsons and other sub-partners in one of the contracts assumed obligations that would have been binding had there been a loss instead of a profit. The contract as between the parties was valid and if there had been a loss, the Edmonsons could have been called upon to contribute their proportion of the losses, as each one of them owned property. By the terms of the contract these sub-partners were bound and gave almost unlimited power by its terms to Newton to bind them. Each contract was limited to each project therein mentioned; as between the parties, this is legitimate and creates a sub-partnership, that is to say, a partnership in the particular interest of a member of a general partnership, *Corpus Juris* 47, page 715. By this relationship a sub-partner becomes liable for the debts as to that particular project of the partner with whom they are sub-partners, but of course the sub-partner has no rights of

the partner in the business of the general partnership. He is liable only for the debts of the sub-partnership.

These contracts of sub-partnership were entered into in good faith at a time when Newton was abundantly solvent and had the prospects of probably $2,000,000.00 profits. These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted, and at that time there was no thought in the minds of any of the parties of delaying or hindering any creditors in the payment of his claims. The Edmonsons had no control as a matter of right under the general contracts obtained by the partnership of Newton and Glenn and no control over the sub-partnership contract other than to assume obligations for losses and conferences among the partners, Newton having general authority and control as to the sub-partnership. At the time of the conveyances on August 22, 1943, the Edmonsons had no intent to hinder, delay, or defraud Newton's creditors and had no knowledge at that time that Newton was suspicious of his financial condition. The Edmonsons were acting in good faith in believing that they were entitled to either the sum of $104,000.00 as their share of the profits of the three jobs, or that they were entitled to the property offered them in settlement of their profits from the three jobs. The Newtons, however, were then not acting in the best of faith; they were suspicious, judging from their conduct soon thereafter and from the difference in settlement and from the difference in the amount due the Edmonsons and the value of the property conveyed. There was in their mind at that time an intent to prefer the Edmonsons over their other creditors in the event a crash should come. The Newtons did not know on August 23, 1943, that a crash was coming, but they were fearful that it might and were therefore undertaking to prefer the Edmonsons in the event it did come and to place their property in the hands of others so as to delay their creditors. At that time they had no intent to defraud.

The audit of Wooton on these three projects was given to the Edmonsons and Newtons on the 15th of August and showed their share of the profits to be $104,000.00, and the Edmonsons were anxious to receive their money and were

demanding of Newton that he settle with them; thereupon, the purported settlement was made on August 23, 1943. There are considerable circumstances tending to show that the deed was not executed on August 23rd and it is strongly urged upon the Court that the deed was back-dated. The circumstances surrounding the execution of the deed were gone into at great length, but the testimony is insufficient to overthrow the presumption of the acknowledgment by the Notary Public and the testimony of the Newtons and Edmonsons that it was actually executed on the 23rd of August. The original deed shows plainly that it was drawn to be executed in either September or October, but there seems to be no attempt to conceal on the face of the deed that this was erased and the word August written in pen and ink. The testimony of Newton as to his movements about that particular time is somewhat improbable but not at all impossible. I am of the opinion, however, that the date is rather immaterial, other than for the purpose of weighing evidence, as undoubtedly the rights of the parties will be governed by the date of October 6, the day the deed was filed for record. Newton was insolvent on October 6 but did not know it. On that date he had no real idea of his financial condition. His books were two or three months behind with postings. Some of his help was undoubtedly incompetent or overworked and it is a matter of common knowledge that at that time there was a great crisis and it was very difficult to obtain sufficient and competent help. Not until October 16 did Newton really know that he was insolvent. Thereafter, of course, many acts were committed indicating and evidencing an intent on the part of Newton to put his property which had already not been conveyed beyond the reach of his creditors. He converted all of his bonds into cash, withdrew cash from the banks, and there were many badges of fraud but none of these point with any reasonable degree of certainty to the Edmonsons.

As a matter of law, fraud must be proved by clear and convincing evidence and is never presumed. It is well settled in Mississippi, however, that where the fraudulent intent of the grantor is shown, then the burden of proof shifts to the grantee to show that he was acting in good faith.

Under the facts hereinbefore found and it appearing that the Edmonsons were guilty of no intent to defraud but were purchasers without notice for a valuable consideration under a conveyance in which the consideration was inadequate, the law in Mississippi and under the Bankruptcy Act is to the same effect, that is to say, the conveyance should be set aside upon the plaintiff, trustee in bankruptcy paying to Mrs. Edmonson for the benefit of herself and Mr. Edmonson the sum of $140,000.00. This is true under the common law, 27 :CJ :344. Under the bankruptcy act the consideration is required to be the present fair equivalent value of the property conveyed. The act, however, provides that such bona fide purchaser who without actual fraudulent intent was given a consideration less than fair for such property may retain the property as security for repayment, U. S. C. A. Title 11, Section 107 (d) 6. A decree may therefore be drawn setting aside all the conveyances to the Edmonsons upon the payment by the trustee, the plaintiff, to them of the sum of $104,000.00.

A different situation arises, however, as to the conveyance to J. B. de Vilentroy, as the testimony is clear and convincing that he had knowledge of the insolvency of Newton, and the conveyances were made without consideration and with intent to hinder, delay, and defraud creditors. Likewise, the trustee is entitled to recover the sum of $22,000.00 from him, which was paid within the four months prior to November 3, 1943. A decree may be drawn in accordance with this opinion and submitted to me for signing.

Dated this the 28th day of August, 1946.

(S.) S. C. Mize,
U. S. District Judge.

No. 232

G. M. McWilliams, *Trustee,*

vs.

F. T. Newton, et al.

Decree

This day this cause came on before the Court to be heard, and the Court having before it the pleadings in said cause and all of the evidence, both documentary and oral, and having heard the arguments of counsel, and having taken said cause under advisement doth now find as follows:

That the defendant, Mrs. J. B. Edmonson and her husband were sub-partners with F. T. Newton in three (3) Government contracts in which their interest amounted to One-Seventh (1/7) of Newton's Two-Thirds (2/3) interest in the Camp Campbell and Greenville Air Base jobs, and two-thirds (2/3) interest in Rohwer, Arkansas Recreation Center. That the sub-partnership agreements were legal and gave to the said Mrs. J. B. Edmonson and her husband the indicated ownership therein with rights of partners to share in the profits and losses accruing therefrom.

The Court further finds that all of the projects made profits and that the total profits arising therefrom, to the Edmonsons, amounted to One Hundred Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) as shown by the audit made on August 15, 1943. That on August 23, 1943, F. T. Newton and Mrs. F. T. Newton conveyed the property shown by the three (3) deeds in this record bearing the date of August 23, 1943, to Mrs. J. B. Edmonson in settlement for the One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) share of profits coming to them. There was an indebtedness on the property so conveyed of Eighty-Five Thousand and No/100 Dollars ($85,000.00), the payment of which was assumed by the Edmonsons. There was transferred also a Note secured by a Deed of Trust of Tommy B. Sims for Two Thousand Five Hundred and

No/100 Dollars ($2,500.00) in addition to the property so conveyed.

The Court further finds that the property so conveyed was worth Four Hundred and Fifty Thousand and No/100 Dollars ($450,000.00) and the amount paid was less than a fair equivalent value, but that the purchase was made without actual fraudulent intent on the part of Mrs. J. B. Edmonson, but in good faith, and that she is entitled under Section Sixty-Seven (67) Paragraph (6) of the Bankrupt Act to be paid the One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight cents ($104,099.58) and to then reconvey the property to the Trustee in Bankruptcy for Mr. & Mrs. F. T. Newton. That the Sims note heretofore referred to should be surrendered to the said Trustee, G. M. McWilliams.

It is therefore ordered that upon the payment to Mrs. J. B. Edmonson, the sum of One Hundred and Four Thousand and Ninety-Nine Dollars and Fifty-Eight Cents ($104,099.58) by the Trustee in Bankruptcy, that she execute a Deed to him, the said G. M. McWilliams, Trustee, or his successor in said position, conveying all the property described in the two (2) Deeds of F. T. Newton to Mrs. J. B. Edmonson dated August 23, 1943; and that she surrender forthwith the Sims Note and Deed of Trust to the said Trustee, G. M. McWilliams.

It is further ordered that the costs of this suit be taxed against the Plaintiffs herein, and the receiver in this cause is directed to pay said costs from the funds accumulated in his hands.

Done, Ordered and Decreed this September 4th, 1946.

(S.) S. C. Mize,
District Judge.

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11905

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts, *Appellant,*

versus

MRS. JOHN B. EDMONSON, *Appellee*

Appeal from the District Court of the United States for the Southern District of Mississippi.

(June 23, 1947)

Before Hutcheson, Waller, and Lee, Circuit Judges

HUTCHESON, *Circuit Judge:*

The matters for determination here had their rise in transfers of a large number of pieces of real and personal property, purportedly made on August 25, 1943, but recorded October 6, 1943, by F. T. Newton, a government contractor, and his wife to Mrs. Edmonson.

On November 4, 1943, the Maryland Casualty Company, surety on Newton's contractor's bond, filed suit against the Newtons, Mrs. Edmonson, and others to set these transfers aside, as fraudulent, and, carrying in its wake the appointment of a receiver for the Newtons, a determination that the transfers constituted acts of bankruptcy on their part, and their adjudication as bankrupts,[1] the controversy has since continued.

On March 23, 1946, defendants, the Newtons and Edmonsons, filed an answer to the intervention. In it, denying, as they had done in the bankruptcy proceedings, that the conveyances were fraudulent or in anywise impeachable, they put forward the theory on which they in part prevailed

[1] Newton v. Glenn, 149 Fed (2) 879.

below, that Mr. and Mrs. Edmonson were sub-partners with Newton as to three of his contracts which were profitable and that the transfers were made to them in satisfaction of their distributive share of the profits from these contracts.

The district judge found: that the Edmonsons were sub-partners in the three contracts named; that these contracts were profitable; that the Edmonsons' share of these profits were $104,000.00; that in taking the conveyances in satisfaction of their profit interest, they had no intention to defraud but acted in good faith; and that they were, therefore, bona fide purchasers; but that the properties transferred were worth $450,000.00, and the amount paid was less than their fair equitable value. Concluding from these findings that Mrs. Edmonson was a purchaser "who without actual fraudulent intent has given a consideration less than fair, as defined in Subd. (d)[2] for such transfers," that "she may retain the property * * * as security for repayment," he gave judgment accordingly. This appeal is from that decree.

Appellant is here with briefs and oral arguments surcharged with the feeling and the accusation that the whole sub-partnership theory on which the case went off below was conceived in sin, born in iniquity and "rocked in the cradle of chicanery, subterfuge and fraud." He insists that the gaze of the district judge was so foreshortened by his preoccupation with the legal niceties of the sub-partnership theory that he could not or would not see the case in its true perspective. He urges upon us that (a) there was no proof of a valid sub-partnership here, (b) if there was, nothing was due the Edmonsons under it, and (c) the case is one simply of a common fraud and should be so decided. Appellee, putting her whole reliance, as indeed she must, on the sub-partnership theory, devotes the major portion of her brief to a discussion of sub-partnerships in particular.

A reading of the briefs and a consideration of the case made by the record makes it quite plain that here, as was the case in *Guy* v. *Donald*, 203 U. S. 399, the questions for decision "go beyond the question of the existence of a partnership." Briefs and record make it quite clear, too, that this is a case, as that one was, where "As long as the matter

to be considered is debated in artificial terms, there is danger of being led by technical definitions to apply a certain name and then to deduce consequences which have no relation to the grounds on which the name was applied." id. at 406. As the court did there, we shall, in order to arrive at a right decision, declining to "debate in artificial terms" "the matter to be considered," decide the case by setting out its substance.

On August 14, 1943, Newton, a contractor, with uncompleted government contracts totaling very large sums, all of them financed through, and assigned to, the Union Planters National Bank and Trust Company of Memphis, Tennessee, owed the bank on account of them approximately $1,500,000.00. On that date Newton made two deeds, each covering the same, and Mrs. Newton made one deed covering other property, to Mrs. Edmonson, Mrs. Newton's sister. These deeds for a recited consideration of $10.00 and other good and valuable consideration, conveyed to her all the property they owned in Mississippi, except their homestead, property which the Newtons in their business statements had valued at $451,000.00, and thus stripped the Newtons and their business of every asset which when they made their banking arrangements they had held themselves out as having.

So gross was this act of nepotism, so conclusive of a fraudulent purpose on the part of the Newtons to delay, hinder and defeat their creditors, that the district judge in the bankruptcy proceedings found as matter of law and in these proceedings as matter of fact that the conveyances were in fraud of Newtons' creditors. When it came, however, to setting them aside as to Mrs. Edmonson, he declined to do so because, though he found that the properties were worth greatly in excess of the $104,000.00 they claimed as due and they were entitled only to hold them as security until that amount was paid them, he found also that they had sustained their burden of showing that in respect of the transfers they were bona fide purchasers without knowledge of Newton's insolvency and without an intent to defraud. In so holding the district court made findings of fact which are clearly erroneous and must be set aside.

If we could agree with him that the so-called sub-partner-

ship agreements were effective to give the Edmonsons an enforceable interest in the profits from the government contracts they dealt with, we still could not agree with his conclusion that, in this controversy between the creditors of Newton and his wife on one side and his wfie's sister on the other, appellee had sustained the burden of showing that there were profits to which she was entitled as between her and Newton, we could not agree that in joining with the Newtons to strip them of their property she acted in good faith and without intent to defraud their creditors.

The three contracts on which Mrs. Edmonson relies as giving her an interest in Newton's ventures are identical in their terms. One deals with the Camp Campbell, one with the Greenville, one the Rohwer contract. Reciting that Newton and Glenn are engaged in the general contracting business, Newton owning two-thirds, and Glenn one-third, that they have entered into a new contract and "it is necessary for the said Newton to acquire additional capital for the construction of said work in order to take the same," each then provides as to the seven persons named, including Newton and Mrs. Edmonson, that each of said parties is to share "for the capital invested equally in the two-thirds interest of Newton, that is to say, each of said parties is to contribute one-seventh of the losses of the two-thirds interest and is to share one-seventh of the profits," not of the general contracting business but of the particular contract named. Each gives Newton full power to conduct the construction and carry out the contract, and to act with reference to it as if he were the sole owner of it. Each declares that the six parties named are the silent partners of Newton and Glenn, and that all of the work is to be carried out in the name of Newton and Glenn, all records and accounts shall be kept in the firm name of Newton and Glenn, and that Newton is authorized to bind all of the parties by any act that he may do. The evidence is undisputed that the Edmonsons furnished no capital and no services, and that Newton assigned the three contracts, in which Mrs. Edmonson claimed an interest, together with others, to the bank to secure any and all of his obligations to it, and that the whole proceeds of the contracts were paid to the bank.

Matters standing thus, we think it perfectly clear that the instruments relied on did not constitute binding obligations on the part of Newton to pay the Edmonsons anything, first, because by express provisions they were to share in consideration of the capital advanced, and they advanced no capital, second, because wholly without consideration and merely promises to make gifts, the Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them. Under this agreement, Newton was to manage the business as though it were his own, and with their full authority, he assigned the contracts to the bank. In a contest with Newton's creditors, including the bank, over Newton's property, Mrs. Edmonson is without standing to claim that she was a creditor of Newton to the extent of her share of the profits from the contracts and therefore a bona fide purchaser.

Further, if mistaken in this and the contracts were valid and enforceable obligations upon Newton to pay the Edmonsons their share of the profits, we think it quite clear that the record, with its showing of inconsistent claims and actions on the part of the Edmonsons and the Newtons, and its general deficiencies, is wholly insufficient to support a definite finding that upon a proper accounting, profits were or would have been due the Edmonsons in the amount they claim.

Finally, the invoked section of the Bankruptcy Act, Section 107 (d) has, and can have, no application to transactions and performances of the kind the record shows took place here. The statute deals with and protects substantial claims of persons who have dealt in fairness and good faith and who, because they have done so, are entitled to equitable protection. It has no application to nepotic and fictitious arrangements of this kind entered into by members of a debtor's family to defeat creditors while keeping the property safely in the family. Hastily put forward and as hastily pressed to a conclusion by Newton and his wife when, their troubles mounting, they were tottering to their fall, the record leaves in no doubt that the plan of conveying their properties to Mrs. Newton's sister was as ineffective as it was disingenuous, as futile as it was false and faithless to

their creditors. The very fact that the Newtons placed in the protective custody of Mrs. Edmonson every piece of property that Newton owned at a time when, on the undisputed evidence, they knew that he was hard up for money and that his affairs were involved, completely refutes as matter of law the claim that the transfers were taken bona fide and that the transferees are entitled to protection. The statute has no such function. It cannot be given such operation. There was no basis in the evidence for the judgment. It is reversed and the cause is remanded with directions to set the transfers aside and to deny the Edmonson claim.

(2176)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. NEWTON and MRS. F. T. NEWTON, Bankrupts

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AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Horace C. Wilkinson,
Of Counsel for Petitioner.

Wilkinson & Skinner,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to permission granted by order made by the Honorable Hugo L. Black, an Associate Justice of this Honorable Court on the 5th day of September, 1947, your petitioner, Mrs. John B. Edmonson, files this amended petition for writ of certiorari and respectfully petitions for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Fifth Circuit (G. M. McWilliams, trustee in bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts, Appellants v. Mrs. John B.

Edmonson, Appellee, No. 11905) rendered on June 23, 1947. Application for rehearing denied on the 17th day of July, 1947. Such decision reversed a decree of the District Court of the United States for the Southern District of the State of Mississippi, Hattiesburg Division.

The opinion of the District Court is printed as Appendix A and the opinion of the Circuit Court of Appeals is printed as Appendix B to the brief filed by Honorable T. J. Wills in support of the petition for a writ of certiorari.

Summary Statement of Matter Involved

This case involves the validity of three written contracts made by F. T. Newton with Mr. and Mrs. John B. Edmonson and the validity of two deeds executed by Newton to Mrs. Edmonson on the 23rd day of August, 1943 in settlement of Newton's liability under the aforesaid contracts to Mr. and Mrs. Edmonson.

The Maryland Casualty Company and National Surety Company, as creditors of Newton, instituted a suit in the District Court on November 5th, 1943, for the purpose of setting aside the deeds which it is alleged were made for the purpose of hindering, delaying or defrauding the creditors of Newton.

Thereafter, and on, to-wit, the 31st day of August, 1944, Newton and his wife were adjudged bankrupts and G. M. McWilliams, trustee in bankruptcy, was substituted as plaintiff. The suit was instituted November 5th, 1943, and thereafter supplemental pleadings were filed and since that time the trustee in bankruptcy adopted the pleadings and sought the relief originally sought by the other plaintiffs. This case was numbered 11905 in the Circuit Court of Appeals. The transcript of the record consists of two printed volumes. Incorporated in those volumes by adoption are the three volumes of the transcript of the record in case No. 11306 in the Circuit Court of Appeals which was the case

in which the Newtons were adjudged bankrupts, 149 F. (2d) 87, Certiorari denied in this Court, 326 U. S. 758.

We will refer to the bankruptcy records as "BR" and the record in the case against Mrs. Edmonson as "ER" indicating bankruptcy record and Edmonson record respectively.

The District Court decreed that the property acquired by Mrs. Edmonson under the deeds above referred to was acquired without actual fraudulent intent on her part and in good faith and that she was entitled under Section 67, par. D (6) of the Bankruptcy Act (Title 11, 1946 pocket part U. S. C. A., bottom page 75) to be paid $104,099.58 and the Court ordered that upon payment to her of said sum by the trustee in bankruptcy, that she execute a deed to him to the property that was conveyed to her in the said deeds.

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause with directions to set aside the transfer and to deny the claim of the Edmonsons. As a result, the Edmonsons are out $104,099.58.

Mrs. Edmonson's rights originated in certain writings called contracts for the construction of three projects that Newton and Glenn agreed to construct for the government and three writings executed by Newton and Mr. and Mrs. Edmonson which we will refer to as participating contracts.

The question presented by the record was well stated by the District Judge in his opinion wherein he said:

> "The question presented by this record is what were the rights of the Edmonsons as of August 23, 1943, by virtue of a conveyance made on that date and recorded on October 6." Er. 924.

In 1940, Newton and Glenn formed a partnership to do general contracting. Newton was two-thirds owner, Glenn one-third owner (Br. 203). They made three contracts with the government in March, June and August, 1942, for con-

struction of projects at Camp Campbell, Greenville, Mississippi, and Rohwer, Arkansas.

All monies due or to become due under the Camp Campbell and Rohwer contracts was assigned to the Union Planters National Bank and Trust Company of Memphis, Tennessee, hereinafter referred to as the "Memphis Bank" in April and August, 1942.

The money due or to become due under the Greenville contract was assigned to the Deposit Guaranty Bank and Trust Company of Jackson, Mississippi, hereinafter referred to as the "Jackson Bank" (Br. 314-317).

In April and August, 1942, Newton made a contract with six of his blood or marriage relatives, including Mr. and Mrs. Edmonson, whereby Newton and his relatives were to pay one-seventh of the losses and receive one-seventh of the profits on the Camp Campbell and Rohwer jobs (Br. 575, 582) (Er. 216, 221, 225).

In June, 1942, a like contract was made between Newton and Mr. and Mrs. Edmonson whereby Newton and Mr. and Mrs. Edmonson were each to pay two-ninths of the losses and receive two-ninths of the profits on the Greenville job (Br. 579) (Er. 933).

The first contract providing for participating in Newton's interest in the Camp Campbell contract was filed for record on the 8th day of June, 1942 in Forrest County, Mississippi, where the parties resided.

In March, 1943, Glenn withdrew and sold his interest in the partnership of Newton and Glenn to Newton for $80,000.00 (Br. 182).

Mr. and Mrs. Edmonsons' share of the profits on the three jobs was $104,099.58 (Br. 1174), (Er. 86, 933).

The government paid the contract price to the banks under the assignments less a balance of approximately $10,000.00 on the Camp Campbell job.

Instead of accounting to the Edmonsons for their share of the profits when the money was received, Newton used their share of the profits in his general contracting business.

On August 23, 1943, Newton deeded Mrs. Edmonson all of the real estate he owned except his homestead in settlement of the Edmonsons' claim (Er. 102, 115, 126).

The real estate was valued at $450,000.00. The Edmonsons assumed incumbrances on the real estate of $85,000.00.

The Petition in Bankruptcy against the Newtons was filed November 3, 1943 (Br. 8), and they were adjudicated bankrupts August 31, 1944 (Br. 1653).

The trustee in bankruptcy prosecuted the proceedings in the District Court to set aside the transfer of the real estate to Mrs. Edmonson.

The District Judge made a finding of fact in which he said:

> "Under the agreement with the Edmonsons, their share of the profits in the three projects amounted to $52,000.00 each or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson, with the consent of her husband, Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00, he concluded to convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and that they were acting in good faith at this time." Er. 923.

The Circuit Court of Appeals reversed the order of the District Court. It held:

1. That the 1942 contracts between the Newtons and the Edmonsons were not effective to give Mrs. Edmonson an

enforceable interest in the profits from the government contracts they dealt with.

2. That the instruments relied on did not constitute binding obligations on the part of Newton to pay to the Edmonsons anything.

3. That they were wholly without consideration and merely promises to make gifts.

4. That Mrs. Edmonson did not sustain the burden of showing that there were profits to which she was entitled.

5. That the transfers were not taken bona fide and therefore the Bankrupt Act, Sec. 67, Par. D. (6) has and can have no application to the transaction between Newton and the Edmonsons.

Statement as to Jurisdiction

This case is one over which the Court has jurisdiction under the provisions of Title 28, Sec. 347, U. S. C. A. and Title 11, Sec. 47, U. S. C. A., 1946 Supp. p. 210.

Questions Presented

The following questions, raised and argued before and passed upon by the Circuit Court of Appeals, are involved in the present petition for certiorari and review:

1. The Edmonsons had a good and valid claim for $104,000 against Newton at the time the deeds in question were executed.

2. The three participating contracts were each supported by a valid, lawful consideration.

3. The deeds following the contracts were each supported by a valid, legal consideration.

4. Newton was not indebted to the Memphis Bank in the sum of approximately $1,500,000.00 at the time the deeds in

question were executed. The amount of the Bank's liability to Newton on said date was expressly reserved.

5. Mrs. Edmonson had no intention of defrauding the creditors of Newton on August 23, 1943, and the Circuit Court of Appeals disregarded the purpose and meaning of Rule 52-A in holding to the contrary.

6. Mrs. Edmonson is entitled to the benefit of U. S. C. A., Title II, Section 107 (d) and Sec. 67 (d) (6), Title II, 1946, pocket part, U. S. C. A., page 75.

Reasons Relied On for Allowance of Writ

1. The holding of the Circuit Court of Appeals to the effect that the instruments relied on did not constitute binding obligations on the part of Newton to account to the Edmonsons for anything is contrary to *Burnet* v. *Leininger*, 285 U. S. 136, as well as the rule supported by eminent authority that an agreement to pay another a portion of profits received from a joint enterprise must account to him.

2. The holding of the Circuit Court of Appeals that the contract between Newton and Mr. and Mrs. Edmonson was wholly without consideration and constituted merely promises to make gifts to the Edmonsons is contrary to *Storm* v. *U. S.*, 94 U. S. 76, and other authorities.

3. The holding of the Circuit Court of Appeals that the deeds from Newton to Mrs. Edmonson were not supported by a valid, legal consideration was a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

4. The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, when it set aside the findings of fact of the District Judge

who saw and heard the witnesses and the decree entered thereon without sufficient facts in the record to support such action.

5. The Circuit Court of Appeals in holding that Section 107 (d) of the Bankruptcy Act was not applicable to this cause and that Mrs. Edmonson was not entitled to the benefit of that Section decided an important question of Federal law, which has not been but should be settled by this Court or decided a Federal question in a way conflicting with applicable decisions of this Court.

WHEREFORE, Your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, commanding him to certify and send to this Court for review and determination, on the day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 11905 in the United States Circuit Court of Appeals for the Fifth Circuit, entitled G. M. McWilliams, trustee in bankruptcy of F. T. Newton and Mrs. F. T. Newton, bankrupts, appellants, v. Mrs. John B. Edmonson, appellee, and that the judgment of the said Circuit Court of Appeals may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioner will ever pray.

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Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS.

BRIEF AND ARGUMENT IN SUPPORT OF THE AMENDED PETITION FOR CERTIORARI

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit's application is printed in Appendix B to the brief filed in this cause by Honorable T. J. Wills in support of the Petition for Writ of Certiorari. Rehearing was denied on the 17th day of July 1947.

Jurisdiction

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Statement of the Case

The statement of the case appears in the petition and amended petition for a writ of certiorari and is incorporated herein by reference. Such facts as are relevant are set forth in such statement and in the arguments that follow.

Specification of Errors

The United States Circuit Court of Appeals for the Fifth Circuit erred in the following respects:

1. In holding that the 1942 contracts between the Newtons and the Edmonsons were not effective to give Mrs. Edmonson an enforceable interest in the profits from the government contracts they dealt with.

2. In holding that the instruments relied on did not constitute binding obligations on the part of Newton to pay to the Edmonsons anything.

3. In holding that they were wholly without consideration and merely promises to make gifts.

4. In holding that Mrs. Edmonson did not sustain the burden of showing that there were profits to which she was entitled.

5. In holding that the transfers were not taken bona fide and therefore the Bankruptcy Act, Sec. 67, Par. D (6) has and can have no application to the transaction between Newton and the Edmonsons.

ARGUMENT

May it please the Court:

We have not referred to a number of matters that transpired subsequent to October 16, 1943, which subjected the Newtons to criticism.

Mrs. Edmonson's rights must be determined by the situation as it was at the time the deeds were executed and delivered on August 23, 1943.

Any sum justly due her at that time is not to be wiped out by any mistake she or her husband or Newton may have made some 60 days later.

We submit three propositions, fully supported by the record, which require a reversal of the order of the Circuit Court of Appeals.

1. The Edmonsons had a valid claim against Newton for $104,099.58 at the time the deeds in question were executed.

2. Newton did not owe the Memphis Bank approximately $1,500,000.00 at the time the deeds in question were executed.

3. Mrs. Edmonson had no intention of defrauding Newton's creditors at the time the deeds in question were executed.

We will discuss the propositions in the order named:

Proposition I

The participating contracts between Newton and the Edmonsons were valid contracts supported by a valuable consideration and created a binding obligation on the part of Newton to account to the Edmonsons for the agreed share of the profits.

A

The three contracts between Newton and the Edmonsons were valid and constituted either (1) An equitable assignment or (2) a subpartnership or (3) a joint adventure.

1. Equitable assignment.

In a case where the husband who was a member of a partnership agreed with his wife that she should be an

equal partner with him in his interest with the company and should share equally with him the profits and losses, this court held:

> "The agreement did not make the wife a member of the partnership without the consent of the other partners, but amounted at most to an equitable assignment of one half of what her husband should receive from the partnership, she in turn agreeing to make good to him one half of the losses he might sustain by reason of his membership in the firm."
>
> *Burnet* v. *Leininger*, 285 U. S. 136, 8 C. J. S. 752-753.

2. A sub-partnership.

> "A contract of subpartnership is an agreement between a partner and a third person by which the latter is to share in the profits, or profits and losses, of the partner with whom the contract is made. The manner in which the profits are to be divided is immaterial. The subpartners are partners inter se, but, in the absence of the mutual assent of all the parties, a subpartner does not become a member of the partnership."
>
> 47 C. J. S. p. 715, Sec. 112.
> 40 A. J. p. 135, Sec. 14.

3. A joint adventure.

> "A contract by which, for a consideration of one dollar and services rendered in the completion of a logging transaction, one party is to receive a share of the profits secured by the other, who is to finance the enterprise, creates a joint adventure."
>
> * * * * * * *
>
> "One contracting to pay another a portion of the profits received from a joint enterprise must account to him"
>
> *Elliott* v. *Murphy Timber Co.*, 244 Pac. 91, 48 A. L. R. 1043.

Viewed as an equitable assignment, sub-partnership or a joint adventure, the three contracts executed by Newton and the Edmonsons gave them an equity in Newton's interest in the contracts with the government that the participation agreements dealt with that was not forfeited by any conduct on the part of the Edmonson's criticized by the Court of Appeals. To deny any obligation on Newton to account to the Edmonsons for the profit made on the three jobs is to arbitrarily deprive them of their property—conduct as fatal to the administration of justice as debate in artificial terms.

B

The three contracts were each supported by a valid lawful consideration.

The promise of Mr. and Mrs. Edmonson to contribute one-seventh of the losses and the promise of Newton to pay one-seventh of the profits created a valid and binding contract.

> "A promise by one party is sufficient consideration for a promise by the adverse party."
> 12 *Am. Jur.*, p. 606.
> *Storm* v. *U. S.*, 94 U. S. 76.

> "Where a contract provides as this does, for payment by one party to another of profits received, it is the duty of the one receiving such profits to account to the other, for otherwise there would be no way by which such party could determine whether there were any profits. The duty to account arises whenever one party is in possession of the profits to which another person is entitled to share, and regardless of what their relationship may have been at the time the profits were earned."
> *Elliott* v. *Murphy Timber Co.*, 244 Pac. 91, 48 A. L. R. 1043.

In view of the rule announced in the authority cited, the Court of Appeals holding that:

> "The Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them",

is manifestly erroneous.

The Edmonsons had an equitable interest in the profits from the time they were earned by virtue of the contract under which they were entitled to a share in said profits.

The objection that the Edmonsons advanced no capital is without merit. Neither Newton nor Glenn advanced any capital. The Edmonsons obligated themselves to pay a specified portion of any losses that resulted from the execution of the contracts. They were solvent and could have been required to carry out their agreement.

> "Whatever will constitute a consideration in the case of other contracts, will likewise constitute a consideration in the case of a partnership agreement. So the partnership agreement will be supported by the mutual covenants and promises of the co-partners such as their mutual agreement to contribute capital to the partnership enterprise, or to contribute services or capital in exchange for services, or assume the risks and liabilities attached to the relationship."
>
> 47 *C. J.*, p. 54, Sec. 46.

Nor can it be truthfully said that the participating contracts were wholly without consideration and merely promises to make gifts. A valuable consideration has a well understood meaning that is recognized by text writers and appellate courts.

> "A very slight advantage to one party or a trifling inconvenience to the other is a sufficient consideration to support a contract when made by a person of good capacity, who is not at the time under the influence of any fraud, imposition or mistake. Traphagen's Ex'r

v. Voorhees, 44 N. J. Ed. 21, 31, 12 A. 895. Whatever consideration a promisor assents to as the price of his promise is legally sufficient consideration. Legal sufficiency does not depend upon the comparative economic value of the consideration and of what is promised in return. 1 Contracts A. L. I. Sec. 76, 81."

Coast National Bank v. *Bloom.*, 95 A. L. R. 532, 174 A. 576.

C

The deeds following the contracts were each supported by a valid legal consideration.

(1) "A preexisting debt is ordinarily considered a good and sufficient consideration for a conveyance."

37 *C. J. S.*, p. 974, Sec. 155.

(2) So is a contingent liability.

"A contingent debt or liability may be a sufficient consideration for a conveyance by a debtor."

37 *C. J. S.*, p. 1068, Text 51, 58.

(3) So is a liability incurred by the grantee at the request of the grantor.

Elliott v. *Murphy Timber Co. supra*, 17 *C. J. S.*, p. 431, Sec. 81.

(4) So if the promisee foregoes some advantage or profit or parts with a right which he might otherwise exert.

"There is sufficient consideration for a promise if the promisee foregoes some advantage or benefit or parts with a right which he might otherwise exert."

12 *Am. Jur.*, p. 576, Sec. 81.

(5) So for the consideration of a waiver of a right of forebearance to exercise the same.

"The waiver of a right or forebearance to exercise the same is a sufficient consideration for a promise made on account of it."

Contracts, 13 *C. J.*, p. 342, Sec. 193.

The authorities cited conclusively and incontestably show that the participating contracts were valid contracts supported by a valuable consideration and created a binding obligation on the part of Newton to account to the Edmonsons for the agreed share of the profits.

PROPOSITION II

Newton did not owe the Memphis Bank approximately $1,500,000.00 at the time the deeds in question were executed and delivered to Mrs. Edmonson.

We most respectfully submit that the Circuit Court of Appeals erred in the following statement found on page 4 of its printed opinion:

> "On August 14, 1943, Newton, a contractor, with uncompleted government contracts totaling very large sums, all of them financed through and assigned to the Union Planters National Bank and Trust Company of Memphis, Tennessee, owed the bank on account of them approximately $1,500,000.00."

It is our contention that the record in this case not only fails to support the quoted statement but it goes further and affirmatively shows that said statement is positively erroneous for the following reasons:

A

The record affirmatively shows the question of the bank's liability to Newton in the amount thereof expressly reserved for future determination by the District Court. Whether the bank owed Newton or Newton owed the bank at the time the deeds in question were executed cannot be determined from this record because all of the facts with respect to their relations are not before the Court. It may may well be that the bank owes Newton more than Newton

owes the bank. The District Court did not undertake to decide that question. On the contrary, a decision of that question was expressly reserved for future consideration.

In the bankruptcy proceeding counsel for the petitioning creditors strenuously insisted that the Memphis Bank was not a party to the litigation. (BR 1536).

Mr. Hannah insisted that the letter of July 24, 1943, did not of itself make a contract and that before Mr. Newton could assert a claim upon or under that letter, he must first introduce evidence to prove that the bank did not set up the line of credit of $1,500,000.00 and that he must offer evidence to show the meaning of the term, "subject to the usual credit reservation" before the court could determine that the letter constituted a commitment to furnish money to Mr. Newton. (BR 1534).

Mr. Newton was asked this question:

> "Now then, Mr. Newton, what loss, if any, have you sustained by virtue of the failure or the refusal of the Union Planters National Bank and Trust Company to carry out their agreement as contained in the letter of July 24, 1943, which was introduced as plaintiff's Exhibit 39? (This letter appears BR p. 659).

Mr. Roberts, attorney for the petitioning creditors objected to the question and stated:

> "There has been created no issue of this debt feature due the bank, and the testimony furnished by Mr. Dumain shows the indebtedness as of August 31 was approximately $1,300,000.00 due to this bank. The only purpose this interrogatory could have would be to seek to try a law suit or claim for breach of contract for unliquidated damages, and that would not be a ready asset and could not be an asset at all under the bankruptcy law, and, therefore, the testimony should not be permitted in this record."

BR. p. 1531

The court overruled Mr. Roberts' objection and stated:

"As I conceive the law to be, if there has been a breach of the contract which should readily be collectable, and is not of a doubtful nature, that it is a matter that can be shown in mitigation or reduction of the amount of indebtedness claimed by the debtor. While the bank is not a party in nor to this particular bankrupt proceeding, yet they have a claimed indebtedness used as one of the liabilities of the alleged bankrupt, for the very purpose of showing and having a bearing upon his solvency or insolvency. And it is my opinion that if a breach of contract should be shown with a reasonable degree of certainty, that it could be collectable within a reasonable time, and that then it would be an asset to be considered in determining his solvency or insolvency. But that if it is of a doubtful nature to such an extent as not to be reasonably certain that it could be realized upon readily, then of course it would not be admissible. The matter can be taken care of in the final instructions to the jury. If it is determined that it is an asset or a showing with reasonable certainty that the question should be presented to the jury, then I would submit it to the jury. If, however, the evidence, after it is in, should disclose that it is one of doubtful nature, either of law or fact, the whole thing would be excluded and the jury specifically instructed at that time that it was not a defense, and the amount of the indebtedness to the bank would then remain completely liquidated as an indebtedness to the bank. For that reason at this time I will overrule the objection."

BR 1531 and 1532

After some further discussion of the matter the District Judge said:

"No authorities being available by attorneys on either side upon the question raised by the Court as to

whether it is a valid contract on its face, and upon the question of whether or not the debtor is required to maintain a certain amount of solvency in order to expect a continuation of credit, and the Court being satisfied in its mind that if the only objection is that an offset could not be made under any circumstances, I would not be justified in spending probably days in hearing testimony in the absence of the jury, and then if it should hold that it was competent, to call the jury back and go over the same testimony. The Court is of the opinion that no prejudice will develop in the minds of the jury, *since it is either* a *question for an offset or else a matter of entire exclusion* if it is not admissible; and the Court will pre-em-torily instruct the jury at the proper time that the indebtedness to the bank was approximately $1,500,000 with no offset whatever.

"On the other hand, if the breach of contract becomes admissible, and evidence is shown with a reasonable degree of certainty that it was breached and that the defendant has suffered damages as a result of the breach, then the jury would be entitled to consider that in deduction of the debt. Gentlemen, I will permit the testimony to proceed now."

BR 1533, 1534

This reference to the bankruptcy proceedings very clearly indicates that Mr. Newton was attempting to get before the District Court the fact that the bank had not carried out its agreement as contained in a letter of July 24, 1943.

When the application for a receiver came on for a hearing an effort was made to get before the District Court the amount of the bank's obligation to Mr. Newton.

Mr. Wills stated:

"There was compensation and estimate to go in on the contracts other than the Brunswick job estimate, of which the government would pay $1,200,000.00 for work already completed, and that money is the money im-

pounded and turned over to the Bonding Companies as the backlog against which the government will pay for the unfinished business and a 10% retainage. I make that statement because I didn't think Your Honor grasped it."

ER p. 455

Mr. Watkins stated:

"We will agree that he will have that amount, but that is all he will have and there are liabilities against that of $3,236,000.00."

The Court:

"That is what I understood. I don't think there is a probability of him coming out whole from any amount he might receive from any of the contracts on which there might be any future indebtedness. *Likewise, as to the suit against the bank, if you should show that the bank brought about all of his losses by its default of the agreement with him you might have sufficient there to take care of it, but that is so vague, indefinite and uncertain that the Court* would not be justified in considering it an asset in view of the scant testimony before the court."

Mr. Wills:

"The Court did not permit us to go into that."

The Court:

"*I thought on this hearing both of you specifically agreed that it would not be necessary to go into that case.* Now, Gentlemen,—I have a term of Court here in April. If you want to try this case on its merits at that time I can do so and would do so. But if you want to await the outcome of the trial of the case against the bank——

Mr. Watkins:

"We will agree upon that.

The Court:

"I will try the case at any time you get ready for trial."

ER, p. 456

The foregoing reference to the record clearly and convincingly shows that the liability of the bank to Newton was expressly reserved by agreement of the parties and consent and approval of the court. The court also stated that if Newton should show that the bank brought about all of his losses by its default of the agreement with him he might have sufficient to take care of his creditors. What the court ruled was that it was an unliquidated claim and in its then form could not be used as a set-off but the court did not hold and did not intend to hold that the unliquidated claim could not be sued on and damages recovered for the bank's breach of its contract. *In view of the fact that the question of the bank's liability and its amount was expressly reserved by the District Court in this proceeding, it was manifestly inappropriate for the Circuit Court of Appeals to say that Newton owed the bank approximately $1,500,000.00 on August 14, 1943, because the Circuit Court of Appeals did not know and could not know, and neither can anyone else know, the amount the bank was obligated to account to Newton for on that date, until the suit against the bank is finally disposed of.* When that is ascertained, it may well be that the bank owed Newton instead of Newton owing the bank on August 23, 1943.

b

Be it remembered that Mr. Dumain made an audit of Mr. Newton's affairs which was introduced in evidence in the district court and which showed his assets and liabilities as of August 31, 1943 (Br. 1224-1227). Mr. Dumain testified that within the seven day period from August 23 to August 31,

there was nothing in the books to indicate any appreciable change in Mr. Newton's financial condition. Assuming therefore, that his financial condition of August 23 was the same as his financial condition as of August 31, we find according to the Dumain audit that Mr. Newton had a surplus of $288,166.86, on the day the deeds in question were executed (Br. 1227-1228).

In the same audit there is a schedule of notes, BR 1338, payable to the Memphis Bank as of August 31, 1943. This schedule shows that said bank held the notes of Newton and Newton and Glenn in the face amount of $1,360,003.93 which included a one hundred thousand dollar advance on the Brunswick, Georgia project that was let to F. T. Newton on July 24, 1943. The adjusted amount of the Brunswick contract was $2,977,503.10 (ER 806). According to the Dumain audit the Memphis Bank had only advanced $100,000.00 on the Brunswick job. Newton was entitled to have the balance advanced him on said assignment. The balance was $2,877,503.10.

For some reason the Memphis Bank did not see fit to introduce in evidence the notes it claims to hold that were executed by Newton or Newton and Glenn and we are unable to find anything in the record that says the schedule of notes contained in the Dumain audit on page 1338 of the record in the bankruptcy proceeding is inaccurate or untrue. It is reasonable to suppose that if Dumain incorrectly listed the notes held by the Memphis Bank that bank would have taken steps necessarily to expose the error in his schedule of said notes.

Evidently the court of appeals looked to the deposition of Emmett J. House (BR 1747) and the deposition of I. W. Wilson (Er. 1793) to support its finding that Newton owed the Memphis Bank approximately $1,500,000.00 on August 14, 1943.

Mr. House's deposition was dated May 26, 1944 (BR 1789). In this deposition he testified that he was vice-president and comptroller of the Memphis Bank.

"Q. Now, Mr. House, you are familiar with the books and records of the bank, and the debts and obligations due by Newton and Glenn and F. T. Newton on these various loans mentioned, are you not?"

"A. Yes, sir.

"Q. What is the amount of the indebtedness due by Newton and Glenn, the copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton?

"A. The present unpaid balance of Newton and Glenn to the Union and Planters National Bank and Trust Company, the principal amount is $65,457.83, interest accrued will be up to June 1, 1944, $1,554.13.

F. T. Newton owes the Union Planters National Bank and Trust Company on account of notes for his own account $489,066.06, on account of accrued interest up to June 1, 1944, $11,546.03.

"F. T. Newton owes the Union Planters National Bank and Trust Company on account of an overdraft $1,265.58.

"F. T. Newton owes the First National Bank of Atlanta on account of the participation in the notes held by the Union Planters Bank and Trust Company for the account of that bank unpaid principal in the amount of $557,556.10, accrued interest to June 1, 1944, $13,148.14.

"F. T. Newton owes the American National Bank, Nashville, on account of notes,—or on account of participation in notes executed to the Union Planters National Bank and Trust Company, unpaid principal, the sum of $357,463.74, accrued interest to June 1, 1944, of $8,560.89.

"The total of the account of F. T. Newton *to the three banks*, unpaid principal, $1,405,351.48, accrued interest $33,255.06, or a grand total of indebtedness of Newton and Glenn and/or F. T. Newton and Mrs. Newton, unpaid principal of $1,470,809.31, accrued interest, $34,809.19.

"Q. So the principal and the interest of the indebtedness of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton exceeds $1,500,000?

"A. That is correct. The notes are all past due."

On page 1758 of the same record the following occurred:

"Q. Now do you have a statement showing the advances made by your bank, or loans made by your bank to the partnership composed or known as Newton and Glenn, and to F. T. Newton?

"A. We have a statement showing those loans that now stand on our books.

"Mr. Roberts:

"We desire to introduce as Exhibit '8' to this witness' testimony said statement."

On page 1759 of the bankruptcy record the following occurred:

"Mr. Roberts:

"By agreement we next introduce as Exhibit '10' a statement of *all* notes held by the Union Planters National Bank and Trust Company and constituting obligations of Newton and Glenn, a copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton, and all obligations of F. T. Newton, general contractor, showing the dates of execution, the amount of the separate notes, and the person or persons signing the separate notes, and the due dates of the respective notes, and the accrued interest on each of the separate written obligations to June 1, 1944.

"(The said paper is accordingly marked Exhibit '10' to the testimony of the witness, and is attached hereto)."

Exhibit 8 and 10 referred to by the witness appear in BR 282-286.

Exhibit 8 is headed "Statement of Newton and Glenn and/or F. T. Newton Debt to Union Planters National Bank & Trust Company as of May 20, 1944."

The grand total is shown as $617,929.04 originally with payments of $63,405.15 and an unpaid balance of $554,523.89 (Br. 282).

Exhibit 10 is headed "Statement of Newton & Glenn and/or F. T. Newton Debt to Union Planters National Bank & Trust Company as of May 20th, 1944."

It is identical with Exhibit 8 except it shows who the notes were signed by. The original amount, the payments and the unpaid balance are identical with the amounts shown on Exhibit 8.

That there might be no misunderstanding about the matter Mr. Roberts was careful to point out *by agreement* (Br. 1759):

> "We next introduce as Exhibit 10, a statement of *all notes* held by the Union Planters National Bank and Trust Company and constituting obligations of Newton and Glenn, a copartnership composed of F. T. Newton, F. S. Glenn and Mrs. F. T. Newton, and *all* obligations of T. F. Newton, general contractor, showing the dates of execution, the amount of the separate notes, and the person or persons signing the separate notes, and the due dates of the respective notes, and the accrued interest on each of the separate written obligations to June 1, 1944."

There is nothing ambiguous about that statement and if it means what it says Exhibit 10 is a schedule of all the notes held by the Memphis Bank constituting obligations of Mr. Newton. It is true that Mr. House undertook to modify his positive and unequivocal statement on pages 1754 and 1755 of the bankruptcy record for we find that on Br. 1757 Mr. House testified:

> "Q. Now, Mr. House, you have testified about this more than a million and a half dollars that is due to the Union Planters National Bank and Trust Company, but you have mentioned that the First National Bank

of Atlanta and the American National Bank of Nashville, Tennessee, were interested in these separate loans.

"A. That is correct.

"Q. Now are any of the notes executed by Newton and Glenn, or Mr. F. T. Newton, or any of the obligations of F. T. Newton, Mrs. F. T. Newton, and F. S. Glenn made out in favor of either of these two banks just mentioned, namely the First National Bank of Atlanta, and the American National Bank of Nashville?

"A. They are not.

"Q. As I understand it, so as to have it clear in the record, all of the evidence of indebtedness, and all of the guarantee agreements of these three parties are in favor of the Union Planters National Bank & Trust Company?

"A. That is correct.

While this testimony is to the effect that Mr. Newton did not execute any notes in favor of the Atlanta Bank and the Nashville Bank yet it is also clear that Mr. House's positive statement is that "Mr. F. T. Newton owes the First National Bank of Atlanta and Mr. F. T. Newton owes the American National Bank of Nashville." And we think his testimony makes it clear that the $1,500,000.00 the Court of Appeals referred to consists of the amount it is claimed Mr. Newton owed the Memphis Bank plus the amount it is claimed he owed the Nashville Bank and the amount it is claimed he owed the Atlanta Bank. That is made plain by the following statement of the witness:

> "The total of the account of F. T. Newton *to the three banks,* unpaid principal, $1,405,351.48, accrued interest $33,255.06, or a grand total of the indebtedness of Newton and Glenn and/or F. T. Newton and Mrs. Newton, unpaid principal of $1,470,809.31, accrued interest, $34,809.19."

The sums mentioned total $1,505,618.50.

Notwithstanding its claim that Newton was indebted to it in the sum in excess of $1,500,000.00, the Memphis bank filed a claim against the estate for $1,100,422.91 (Br. 822). The discrepancy between the amount claimed in the claim filed with the referee and the amount stated in the opinion of the Circuit Court of Appeals of Newton's indebtedness is not accounted for.

d

The notes Newton executed to the Memphis Bank recited "for value received" the maker promises to pay, etc. (Br. 294, 299, 304, 309).

Mr. Newton makes it clear in his testimony that he had an agreement with the Memphis Bank with reference to putting up the money. On pages 372 and 373 of the record in Mrs. Edmonson's case, Mr. Newton testified:

"A. Yes, sir.

"Q. Did you have any agreement with the bank with reference to putting up the money?

"A. Yes, sir.

"Q. Tell the Court what agreement that was?

"Mr. Watkins:

"If the Court please, I think that that is not involved here; *I don't want to go into the controversy between him and the bank as to whether there was a breach of contract.*

"By the Court:

"I am going to overrule the objection; *I don't think it is necessary to go into the merits of whether there was a breach of the contract.* I will overrule the objection because I think it is necessary to get a picture of the situation.

"Mr. Wills:

"Q. What was the agreement you had with the bank?

"A. What job are you talking about?

"Q. With reference to the Brunswick job?

"A. They were to furnish one and one-half million dollars at the high point; at no time would the loan

exceed one and one-half million dollars on the job. We might borrow three million dollars from time to time, but at no time to exceed one and one-half million dollars.

"Q. Was the bonding company advised of the contract that the Memphis bank was to put up the money?

"A. Yes, sir.

"Q. Tell the Court whether or not the bonding company required that arrangements be made before they made the bond?

"A. They required that I have sufficient cash or money to run the job before they would make the bond."

The consideration for an agreement may always be shown by parole evidence provided the parole evidence does not contradict the consideration expressed in the writing.

32 C. J. S. page 970:

"When a note recites that it was given for value received it is permissible to show by parole evidence what was the real consideration of said note."

Boothe v. *Dexter Fire Engine Company,* 118 Ala. 369-379; 24 Sou. 405.

Mr. Newton testified positively that the amount the Memphis Bank was due him was in excess of $2,033,000 (Br. 814).

As of October 16, 1943, the bank had received from the government $4,402,460.64 on the assignments the bank had taken from Newton and Glenn and it only advanced $4,175,000.00 against those assignments, leaving $227,460.64 in excess of receipts from the government over advances made by the bank on those assignments.

Mrs. Newton testified positively that she and her husband did not owe the Memphis Bank a million four hundred thousand dollars (Er. 421).

On May 31, 1944, Mr. Newton wrote the Memphis Bank as follows:

"I am not indebted to you in any sum whatever. You are indebted to me in the sum of $1,250,000.00 for

which I now make demands on you for immediate payment thereof (Br. 1528).

All of this evidence is incompatible with the idea that Newton owed the Memphis Bank approximately $1,500,000 on August 14 or August 23, 1943.

PROPOSITION III

Mrs. Edmonson had no intention of defrauding the creditors of Newton on August 23, 1943.

There is no more reason to doubt that Newton's agreements with his relatives by blood or marriage were entered into on the date they purport to have been executed, than there is for doubting that Glenn executed the agreement with his wife, son and daughter on February, 15, 1942 (Br. 183). Both men were attempting to minimize the amount of income taxes they would have to pay and they were resorting to an arrangement that was recognized as lawful at that time.

There is nothing in this record that can be tortured or twisted into an intimation that the Edmonsons knew that Newton was expecting to encounter economic difficulties when the deeds were executed.

On this point the District Judge said:

> "Under the agreement with the Edmonsons, their share of the profits in the three projects amounted to $52,000.00 each or a total of $104,000.00 for the Edmonsons. The Edmonsons desired settlement of their share in the profits since the jobs were practically completed and the Newtons thereupon agreed to convey to Mrs. Edmonson, with the consent of her husband, Mr. Edmonson, all the property described in the deeds. Newton at this time did not know that he was insolvent but from his actions was beginning to anticipate that things were not going just right and rather than call upon the bank to advance $104,000.00, he concluded to

> convey this property to the Edmonsons in settlement of their share of the profits. The Edmonsons at this time had no information as to the financial condition of Newton but honestly believed that he was solvent and they were acting in good faith at that time" (Er. 923).

The Circuit Court of Appeals should not be allowed to brush aside and disregard this definite, specific finding of fact by the District Judge because of its reluctance "to debate in artificial terms." We have no disposition to debate in artificial terms but we most earnestly and sincerely protest against the Court of Appeals annihilating a definite and specific finding of fact when the record does not justify such action on its part.

The record in this case is voluminous and we think it incumbent upon the attorneys for the respondent to point to the page of the record and the language of the witness that shows that the District Judge was mistaken in the finding of fact that was made.

This is not the kind of a case where the opinion of the Appellate Court may be substituted for the finding by the trier facts. The district judge saw and heard the witnesses. He was in a much better position to pass on their credibility than was the Circuit Court of Appeals or this Court. In disregarding the lower court's finding of fact, the Circuit Court of Appeals did not give due regard to the opportunity of the trial court to judge of the credibility of the witnesses. The Court disregarded the purpose and meaning of Rule 52(a):

> "Where parties may differ as to the correct solution of the factual problem faced, it is the duty of the court of review to refrain from attempting to substitute its findings for those of the trial court."
>
> *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. (2d) 891.

"A finding by a trier of the facts based upon conflicting evidence will not be disturbed by an appellate court."

Storley v. *Armour,* 107 F. (2d) 499.

"When the credibility of a witness is the determinative factor in arriving at the findings of fact, the reviewing court will not usually upset those findings made by the judge who had the opportunity of seeing and hearing the witnesses."

Malloy v. *New York Life Ins. Co.,* 103 F. (2d) 439;
Occidental Life Ins. Co. v. *Eiler,* 125 F. (2d) 225.

This Court has ruled that it is the duty of an Appellate Court to accept a finding of fact unless clearly and manifestly wrong.

Butte & Superior Co. v. *Clark-Montana Co.,* 249 U. S. 12, 30.

When the court of appeals held that Mrs. Edmonson had not sustained the burden of showing that there were profits to which she was entitled and that the record is wholly insufficient to support a definite finding, that upon a proper accounting profits were or would have been due the Edmonsons in the amount they claimed, the court obviously disregarded the Wooten audit (Er. 86), which was fully credited by the trial court and which has all the earmarks of an honest, intelligent, accurate statement of the amount of profits in the three jobs in which the Edmonsons were interested.

When the Circuit Court of Appeals asserted that Mrs. Edmonson joined with the Newtons to strip them of their property, it disregarded the record in this case. Mrs. Edmonson was only attempting to recover for herself and her husband that which she thought they were justly due. At the time that the property was conveyed to the Edmon-

sons it must be remembered that the bank held assignments of money due or to become due under contracts in the sum of eleven million dollars and that Newton reasonably expected to make a profit of more than $2,000,000.00 on the contracts that were then under way. Newton doubtless preferred to pay the Edmonsons off in real estate instead of asking the bank for money with which to pay the Edmonsons the share of the profits they were entitled to receive. The fact that he may have dealt generously with the Edmonsons by no means indicates that Mrs. Edmonson had any intention of defrauding his creditors. There is nothing in this record to indicate any cloud on the horizon on August 23, 1943. There is nothing to indicate that the Edmonsons knew or by the exercise of reasonable diligence could have known on August 23, 1943, that Newton even suspected that he would encounter financial difficulties. It is made clear by the record that Newton was conscious at that time that he had used money in his business which he should have accounted to the Edmonsons for months prior to the execution of the deeds in question but the very fact that Mrs. Newton and Mrs. Edmonson were sisters and that the families were close, explains why Newton felt free to deal with the Edmonsons in that manner, whereas he might not have dealt with a stranger in the same way.

As we read Judge Hutcheson's denunciation of "nepotic and fictitious arrangements" . . . as "futile as it was false and faithless to their creditors" which to us approaches the "artificial terms" which the learned Judge disdained, we are impressed that Mr. Justice Greer's classic, as reported in *Turner* v. *Hand,* 3 Wall Jr. (C. C.) 88, 112, 24 Fed. Cas. No. 14,257, at page 362 might bear repetition here.

> "The law abhors fraud. Every honest mind hates it, and even those who practice it themselves will join in the denunciation of it. It makes them feel virtuous

for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which magnifies the importance of every fact upon which suspicion of fraud may be raised, and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, *we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice.* 'Trifles, light as air,' then become 'strong as proofs of holy writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we believe to be superior sagacity. Rogues may be cunning, but they can't deceive us. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the rein from our judgments, and rush headlong in this chase after the fox called fraud. Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion."

Fraud is so odious that it must be proved by clear and convincing evidence.

> "Astute as courts should be in the detection of fraud, they are not justified in finding it on grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, it should receive it."

Muirheid v. *Smith*, 35 N. J. Eq. 303, 309;

McCarthy v. *Scanlon*, 176 Pa. St. 262, *35 Atl. Rep. 189.*

"Fraud may be inferred from facts and circumstances, but when these facts are suspectible of a natural and probable explanation consistently with the good faith and honesty of the parties they do not prove fraud, and the legal conclusion then is in favor of innocence."

Garrow v. *Davis*, 10 Fed. Cas. No. 5,257.

Conclusion

On August 23, 1943, there was no cloud on the horizon so far as Mrs. Edmonson could see. She had no reason to suspect that Newton was in strained circumstances. He had every appearance of a fortunate government contractor at that time. Newton took on some 23 contracts with the government after he entered into the participation contracts with the Edmonsons. It was reasonable for him to conclude that it was much better for him to settle with the Edmonsons by conveying property instead of taking cash out of his business. We do not mean that Newton would have been justified in conveying property worth much more than the amount he was obligated to account to the Edmonsons for in settlement of his obligation to the Edmonsons. It must be remembered that Mrs. Edmonson assumed substantial incumbrances on the property. Not every person is willing to take on a load like that; *but even if the property conveyed was worth much more than Newton was obligated to account to the Edmonsons for that did not affect Mrs. Edmonson's right to protection under Bankruptcy Act, Section 67 (d)(6) 11 U.S.C.A., Sec. 107, 1946, Pocketparts, page 75.*

The District judge found:

"Newton at this time did not know that he was insolvent . . . The Edmonsons at this time had no informa-

> tion as to the financial condition of Newton but honestly believed that he was solvent and they acting in good faith at that time."
>
> *Er. 923.*

Even counsel for the trustee exonerates Mr. and Mrs. Edmonson of any knowledge of Mr. Newton's financial affairs at the time the deeds were executed. In their brief, they say:

> "She (Mrs. Edmonson) knew at the very time, as did her husband, that the books of the bankrupts were in a mess. (R 486) and they could not tell the status of the bankrupts from the records. (R 488)."

If the Edmonsons could not tell Mr. Newton's financial status from the records and Newton himself could not tell it from his own books how can it even be contended that Mrs. Edmonson was undertaking to defraud the creditors of Newton by taking real property which was encumbered by a mortgage in a large amount in settlement of the monied claim that was just and past due?

The foregoing finding of the district judge who saw and heard the witnesses was a natural conclusion for a rational mind to reach after a careful analysis of the evidence. The holding of the Circuit Court of Appeals to the contrary finds no support in the record outside of some circumstances which are not inconsistent with the good faith and honesty of the parties on August 23, 1943.

Respectfully submitted,

WILKINSON & SKINNER,
Attorneys for Petitioners.

HORACE C. WILKINSON,
Of Counsel for Petitioner.

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STATUTES

COURT RULES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

RESPONSE OF G. M. MC WILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS, TO PETITION FOR WRIT OF CERTIORARI OF MRS. JOHN B. EDMONSON.

The respondent respectfully represents and shows to the court:

I

Objections to Sufficiency of Petition and Record for Writ of Certiorari

1. The petition does not conform to the requirements of Rule 38:

(a) In that under said rule a certiorari petition "shall be accompanied by a certified transcript of the record in the

case." Only a part of the record has been filed in this Court, there having been certified only the printed part of the record which is substantially less than the whole record. From Cause Number 11,306 of the United States Circuit Court of Appeals for the Fifth Circuit, which is a part of the record in this cause, there appear large parts of the record, identified in pages 1 to 6, inclusive, of volume one of the printed record, which have not been printed, and in Cause Number 11,905 of said court, which incorporates said cause Number 11,306, large parts of the record are eliminated, as reported on pages 1 to 3 of volume one of the printed record; and in addition thereto, in said Cause Number 11,306, original exhibits went up as identified in district court order appearing in volume three at page 1677 and in Cause Number 11,905 in order appearing in volume two at page 947. These parts of the record before said Circuit Court of Appeals are not before this Court.

(b) The petition does not conform to that part of said Rule 38 which requires that "the petition shall contain a summary and a short statement of the matter involved;" and the supporting brief is not direct and concise.

(c) The petition does not assign "special and important reasons" for writ of certiorari as required by Rule 38 (5).

(d) There is total absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts and no important question of Federal Law is involved, and there is total absence of substantial Federal question or case of gravity and importance to justify granting petition.

> "The decree that was to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears by reference to our files that the application was opposed

by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and federal courts, or between those of federal courts of different circuits." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U. S., p. 251, 36 S. Ct. 269, 60 L. Ed. 629.

2. The supporting brief does not conform to Rule 27 of this Court in that a concise statement of the grounds on which the jurisdiction of the court is invoked is not furnished and neither is there a concise statement of the case containing all that is material to the consideration of the awkwardly presented questions, and with no page references to the printed record.

II

Response Proper to Petition for Writ of Certiorari

"Jurisdiction"

Under this heading, it is claimed that the provisions of Section 240 of the Judicial Code as amended, Section 347 of Title 28, United States Code Annotated, Rule 38 of this Court and Rule 52 of District Court Rules of Civil Procedure, constitute basis for jurisdiction of this Court. Reference is also made to Section 407, Title 40, United States Code Annotated, and Section 67 (d) (6) of the Bankruptcy Act. There is nothing in the pleading or in the brief to cause any of these laws and rules to be invoked as basis for the claimed jurisdiction of this court.

"Case History"

The petition, under heading above, mixes law and facts and erroneously pictures the existing record of facts and the law applicable thereto.

The five volumes of printed record before this Court are made up of three volumes in said Cause Number 11,306 involving the bankruptcy, and of two volumes in said Cause Number 11,905; and the testimony in the bankruptcy case became part of the testimony in this cause on theory that the bankrupts were grantors, and the testimony supporting conclusion that the conveyances here involved were fraudulently made substantially influenced the rights of Mrs. John B. Edmonson. The three volumes of printed record in the bankruptcy cause were introduced as testimony in this cause, as well as all other testimony in the bankruptcy cause (R. 457). (In this pleading and brief the pages in said Cause Number 11,306 will be identified by letters B. R. for bankruptcy record, and in this cause proper by the letter R. for record.)

The bankrupts were interested with F. S. Glenn in building of military reservations and housing projects prior to March 1, 1943. Thereafter, F. S. Glenn withdrew from the business, and with approximately twenty-three government contracts scattered in six southern states, there was failure to meet payrolls by the bankrupts on October 16th, 1943 (B. R. 382). On November 3, 1943, the original petition in bankruptcy was filed, with two amendments to follow, and wherein there were involved the First and Second Acts of Bankruptcy (B. R. 8-21). On November 5, 1943, the Maryland Casualty Company filed suit to set aside the conveyances as fraudulent, and this suit was subsequently amended, and after the adjudication of the Newtons in bankruptcy the trustee in bankruptcy intervened as complainant for all creditors of the bankrupts on March 21, 1946. The trial of this cause resulted in judgment for Mrs. John B. Edmonson; but the trial court found facts which in themselves made it necessary for the court on appeal to find for the trustee in bankruptcy.

Three sources of facts appear in the record, namely:

1. The trial resulting in appointment of the temporary receiver making up volume one in said Cause Number 11,905, and

2. The trial of the bankruptcy cause bearing Number 11,306 in said Circuit Court of Appeals, and consisting of three printed volumes in addition to the index and substantial of testimony and original data not printed, and

3. The final trial of the pending cause on its merits by the trial court, including all of the testimony in the original receivership trial and all of the testimony in the bankruptcy trial, as well as a part of the testimony taken before the referee in bankruptcy since adjudication and reference.

From these three sources of fact, broadly speaking, the Circuit Court of Appeals found three fundamental reasons why the trustee in bankruptcy was entitled to prevail, they being:

1. That the deeds were without consideration and void because:

(a) The contracts between the Newtons and Edmonsons of 1942 recited paying of capital when no capital was furnished, and

(b) Same were merely promises to make gifts, and

(c) The Edmonsons did not and could not have any interest in the profits until realized and paid.

2. That the testimony was not sufficient to show that there were any profits under the 1942 contracts.

3. That said Mrs. Edmonson was a party to the fraudulent conduct of the Newtons, who conveyed all of their real property to her without her having paid any money therefor.

In the original receivership trial the trial judge appointed a temporary receiver, and in so doing recognized that if the Newtons were solvent, as they claimed, the conveyances here involved may be upheld, but in concluding in favor of having a temporary receiver the trial judge stated:

> "I have not overlooked the fact that the defendant may receive sufficient equity to take care of these contracts. If he does, the properties would go then to the people to whom he has conveyed them. On the other hand, if, as I believe from this testimony, he will not be able to recover a sufficient amount from these contracts to pay off his indebtedness, then it occurs to me that this conveyance of all property would have to be set aside." (R. 455.)

In the bankruptcy trial it developed that the Newtons owed more than three million dollars, and that the lands here involved constituted their real estate other than the homestead, and that they were hopelessly insolvent, and that the attorney representing the bankrupts also represented Mrs. John B. Edmonson (B. R. 765-6), and that the Newtons' books and records were out of balance more than one million dollars as to cash accounts alone (B. R. 1377), and that the Newton auditor had no knowledge of the faulty books which did not show $600,000.00 due subcontractors (B. R. 1377). There were many other developments, including the fact that there was in existence a Federal tax lien of $225,000.00. Based upon this record in three printed volumes, which said record is a part of the record in this cause as aforesaid, the trial judge, after relating the facts, concluded in part as follows:

> "Under this set of facts a Court can reach no other conclusion than that these conveyances were made at least to hinder and delay creditors in the collection of

their debts and the law thereupon presumes that they were fraudulent. . . .

"The law is that if the conveyances were made with the intent to hinder, delay or defraud creditors that the burden of proof is upon the defendants to show solvency if they rely upon solvency. They have failed to do this." (B. R. 1657.)

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, the court there upheld the trial court, and in so doing made reference to the various acts of bankruptcy which had been committed, and specifically the one dealing with the conveyance of property with intent to hinder, delay and defraud creditors, and thereupon, the court held that:

"The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish prima facie all the acts of bankruptcy charged in the amended and supplemental petitions." *Newton, et al.* v. *Glenn, et al.*, 149 Fed. 2d 879.

The Honorable T. J. Wills, then representing the Newtons in bankruptcy, and now representing Mrs. John B. Edmonson, filed with this court petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and said petition was denied on October 22, 1945. See *Newton, et al.* v. *Glenn, et al*, 326 U. S. 758, 66 S. Ct. 100, 90 L. Ed. 456.

The testimony in the final receivership hearing appears in Volume Two of said Cause Number 11,905. Mr. John B. Edmonson, husband of petitioner, testified that the Newton books "were in a mess," (R. 846), and that the Newton records were in bad condition and he "was disturbed about it," (R. 487), and that the Edmonsons did not know

whether Newton was solvent or insolvent, "I hadn't been able to find that out." (R. 492); but they took title to the property and permitted the Newtons to continue to collect rents thereon after the deeds were delivered and recorded. For the Edmonsons, Mrs. F. T. Newton testified that she was the sister of Mrs. Edmonson, and she admitted that the Edmonsons furnished no money to finance the project (R. 584). She admitted that the Newtons owned the Mississippi Electric Company, and that after default L. W. Totten was used as manager (R. 573), and that $30,000.00 of money was passed through the Honorable T. J. Wills, attorney for the Newtons and Edmonsons, for carrying on the Mississippi Electric Company after the inability of the Newtons to go forward in their own names (R. 573), and all the money was handled in cash (R. 574), and John B. Edmonson became assignee and had the business run in his name (R. 577).

There was an interesting sidelight in this trial, growing out of the fact that Reuben L. Newton, brother of F. T. Newton, took bonds of more than $40,000.00 and turned them over to Mrs. Newton and she carried these bonds to Washington in August of 1944, and gave the cash from the bonds to Reuben L. Newton, (R. 628); and at one time she testified that it was $20,000.00 of money, but when she was faced with the fact that the Treasury Department records showed she had gotten more than $38,000.00 the amount was increased in the testimony, and said Reuben L. Newton testified in his own behalf that the money was taken and buried in a jar on the lawn of his home (R. 645), and subsequently he took up the jar and put the jar with the money in it in a dirty clothes closet in his home in Jasper, Alabama, without his wife having knowledge thereof, and without his knowing how much money was in the jar or how full of money it might be (R. 679). Mrs. John B. Edmonson was only able to identify six pieces of property of the total

conveyed to her of value of $451,000.00 (R. 848). On trial before the referee, when Mrs. John B. Edmonson knew nothing, he cautioned her that she was answering "I don't know" to every question and that she ought to know something (R. 881). All of the testimony was conflicting and every witness for Mrs. Edmonson told a different story about every major fact when testifying a second time, or a third time, as in the case of Reuben L. Newton. This testimony, unworthy of belief, was the testimony before the Circuit Court of Appeals.

Under case history, petitioner refers to page 795 of the record, but this only shows the money passing into the hands of the Memphis Bank under the assignment, and it had nothing to do with the wide discrepancies brought about by waste on behalf of the Newtons and the Edmonsons, and it proved nothing as to the net profits on the three federal projects constituting basis for claim of Mrs. Edmonson.

In the history of the case, it should be mentioned that the Edmonsons knew nothing about any gains or losses under the contract, and they depended upon the so-called Wooten audit, and that audit on its face discloses that it was not intended to cover the economic status of the three contracts through which the Edmonsons want to claim as of August 15, when the audit was completed. In fact, the audit only covered down to the end of December 31, 1942 (R. 86). Because of this situation, the Circuit Court of Appeals had no basis for determining that the Newtons owed the Edmonsons anything under any circumstances.

"The Attack on the Property Transfer"

The petitioner is complaining of an interpretation given to Section 407, Title 40, United States Code, Annotated. In petition for certiorari in the bankruptcy cause aforesaid, the same attorney was calling for an interpretation of Sec-

tion 270 (a) and (b) of said Title 40, commonly known as the Miller Act. It is true that the Memphis Bank was assignee of a number of the contracts. It was not assignee against all of said contracts; but when the bank determined that the Newtons had failed to pay subcontractors with money he had obtained therefor to the extent of more than $600,000.00, and his books were behind for many months, as he admitted, and he was hopelessly involved, the bank was unwilling to make further advances; but this set of facts has nothing to do with the rights of the trustee as against Mrs. Edmonson, who obtained deeds to all of the Newton real estate at a time when they were insolvent and unable to pay their debts, and owing more than three million dollars, with the Edmonsons on notice of the precarious economic conditions of the Newtons.

"The title of Petitioner to the Property was attacked"

Petitioner correctly states that the trial court held that the price paid for the property was not its fair and equitable value. In fact, the court held that "In August, 1943, Newton's books and records were many months behind and were not properly posted, and he did not know financially just what his condition was". He represented to bank officials that he owed subcontractors approximately $140,000.00, but it developed that he owed more than $600,000.00 to subcontractors, and he was insolvent (R. 922). The court further held that these three contracts through which the Edmonsons claimed were approximately ninety-five per cent complete on August 23, 1943, when the three deeds were executed (R. 922). The trial court in supplemental finding of facts held that "At the time of the execution and delivery of the three deeds and the assignment, aforesaid, no money or property was delivered to the grantors and assignor for the three deeds"; and the court further held that

after the execution and delivery of the three deeds and the assignment "The grantors retained benefits flowing from the property in that they gave no notice of the conveyances or assignment and continued to collect rents and retain same until the default of the Newtons on October 16, 1943." (R. 932).

With this kind of record, the opposition is contending that there has been a failure to apply Section 67 (d) (6) of the Bankruptcy Act, and that the Circuit Court of Appeals has been unwilling to give effect to Rule 52 of United States District Court Rules of Civil Procedure. We, of course, contend that there has been no violation of any law, rule or regulation, and that said Circuit Court of Appeals had no election but to render the opinion against which petition for certiorari to this Court has been filed.

III

Argument for Respondent

The brief for petitioner correctly represents that there was a contract between F. T. Newton on one side and Mr. and Mrs. John B. Edmonson and others on the other, dated April 6, 1942, (R. 216), but there is a failure to recognize that the partnership of Newton and Glenn consisted of F. T. Newton, Mrs. F. T. Newton and F. S. Glenn, and such was the conclusion in the bankruptcy trial, and Newton was in no position to contract away two-thirds of the partnership business to members of his family and his wife's family, in spite of the fact that the trial judge held that he did make the contract and that at the time he had a right so to do to avoid income taxes, the trial judge stating in his opinion that "These subcontracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted." (R. 925). As the Circuit Court of appeals held, these so-called subpart-

nership contracts were without consideration and void; and the court also recognized that there was no proof to show profits on the particular contracts, because, as pointed out in statement of facts hereto, the audit of R. G. Wooten only covered to the end of 1942, and these contracts were only ninety-five per cent completed on August 15, 1943, when said audit was dated. The discussion about subpartnership rights, therefore, has no place in this consideration, because of absence of proof to support same. If the opposition could prevail, there would be a loss to creditors of property valued by the bankrupts at $451,000.00 as set forth in financial statement (R. 750), and which property was listed in financial statement to the Memphis Bank and others to obtain credit (B. R. 203-773). Then auditor Paul Mote, for the Maryland Casualty Company and the National Surety Corporation, initiating this suit, estimated in 1943 that the Newtons were insolvent to the extent of two million dollars (R. 138); but in this he was mistaken, because there are claims probated in bankruptcy of $2,387,491.32 (R. 821-3); and at the time of the trial of this cause the trustee held for the benefit of creditors less than $50,000.00, and the outstanding and the only property of value to pay these claims is the real estate involved in this cause, which the Newtons deeded to Mrs. Edmonson, sister and sister-in-law of the bankrupts, at a time when the Newtons and the Edmonsons knew that this included all the real property they owned. Mrs. Edmonson testified that she was very close to her sister (R. 834), that she put no money in the contracts constituting the basis for her claim (R. 836), that when she received the deeds here involved there was no passing of money or property (R. 837), that she contributed no money or property towards the three government contracts (R. 838), that she knew nothing about the profits and losses (R. 842), that the revenue from the property included in the

deeds was $5,000.00 per month (R. 857), and that she knew of no other property owned by the bankrupts and not covered by deeds (R. 862). In this case, Mrs. John B. Edmonson put nothing into the three contracts involved, and she paid nothing for the real estate identified in the deeds. Judge Cordozo when Chief Justice of the Supreme Court of the State of New York, in speaking of a situation where the facts were not as strong against the party as against petitioner here, said:

> ". . . A case may be supposed where a special partner receives in cash his capital contribution, the general partners retaining property sufficient at a fair valuation to pay the debts in full, but the next day or the next hour the property is destroyed by earthquake, flood, or fire. The conclusion is hardly thinkable that the special partner may keep the cash, and leave the creditors with nothing. His contribution, like the capital of a corporation, and to a similar extent, is to be treated as a trust fund for the discharge of liabilities." *Kittredge v. Langley, (N. Y.)*, 169 N. E. 626, 67 A. L. R. 1087.

Section 407, Title 40, United States Code Annotated

The opposition mentions the law above identified, which became effective on June 16th, 1933. However, this act related to the Federal Emergency of 1933, and the projects here involved were let by the United States to the bankrupt contractors after 1940 and admittedly were a part of the national defense program. We, therefore, are at a loss to understand why petitioner and her counsel inject into the discussion the Act of 1933 dealing with the depression and the assignments permissible under that Act. The assignment of Claims Act appearing as paragraph 203, Title 31, United States Code Annotated was the basis and controlling law for the assignments here involved (B. R. 314).

This Assignment of Claims Act of 1940 has been construed by the courts, including the Circuit Court of Appeals for the Fifth Circuit, and this court.

> "In addition to protecting the Government, which was the prime purpose of the section before its amendment, as construed in Martin *v.* National Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the amendment of 1940 had the incidental effect of protecting that assignee who filed his assignment and gave notice under the provisions of the statute." *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company,* 149 Fed. 2d. 73 (May 17, 1945, 5C).

It is agreed that the Government contracts of the bankrupts were covered by performance and payment bonds required under paragraphs 270 (a) and (b), Title 40, United States Code Annotated; but this act has no application here. We are only dealing with a suit involving fraudulent conveyances made by the bankrupts to a sister of one of them. Petitioner is now claiming before this Court that even though the Memphis Bank was due more than $1,500,000.00, and even though the contractor had received monies to pay subcontractors and had failed to use this money to the extent of $600,000.00, and even though the real estate valued by the bankrupts at $451,000.00 on financial statement had been secretly conveyed away, still it was the duty and obligation of the bank to continue to advance money to the bankrupts for the carrying on of their work. Such is not the law, and could not be the interpretation of either of the Federal statutes identified; but if this were the law, it has nothing whatsoever to do with the rights of creditors with claims of more than $2,387,000.00 remaining unpaid, and with no hope to get any payment whatsoever unless the real estate listed on financial statements at $451,000.00 is made available to them through the trustee in bankruptcy.

Application of Section 67 (d) (6) of the Bankruptcy Act

Petitioner contends that the Circuit Court of Appeals was in error in holding that this act had no application to a case of this kind. In this we are convinced that the Circuit Court of Appeals was correct, but no different result could have been reached had this act been applicable and applied, because it was not intended under that law to make it possible for persons to give away their property to members of their family while insolvent. The bankruptcy cause has already been before this Court on petition for writ of certiorari, and the petition was denied. It was held in that cause that the bankrupts executed these deeds to Mrs. John B. Edmonson with the intent to hinder, delay and defraud their creditors. Under the existing facts, even if said Mrs. Edmonson had a claim and proved it, which she did not, still she could not prevail under the Federal Act on the theory that she was a purchaser in good faith for a present, fair equivalent value. As pointed out above, she paid nothing to become a party to the 1942 contracts with Newton and Glenn, and she paid nothing when she obtained the deeds, and she knew at the very time, as did her husband, that the books of the bankrupts were in a mess (R. 486), and that they could not tell the status of the bankrupts from the records (R. 488).

Application of Civil Rule 52 of United States District Courts

Petitioner contends that the Circuit Court of Appeals set aside the finding of facts made by the district court, and violated said Rule 52. The record disclosed that the United States Circuit Court of Appeals reached its conclusion on facts not found by the district judge. The district judge did not recognize that the Edmonsons failed to prove that

anything was due them even if the 1942 contracts between Newton and Glenn on the one side and the Edmonsons on the other were enforceable. The Circuit Court of Appeals took the position that the testimony was wholly insufficient to support a definite finding of an indebtedness due by the Newtons to the Edmonsons. In addition thereto, the Circuit Court of Appeals recognized, as contended for the trustee, that these conveyances were fraudulent and void under the existing law.

> "This court always proceeds slowly in reversing a chancellor on the facts. But the Constitution invests us with appellate equity jurisdiction, and, in reviewing this record, we do so as chancellors, charged with the solemn duty of requiring the proof to measure up to legal standards. If, according to our view of the facts and the promptings of our conscience, the learned chancellor was manifestly wrong, then it becomes our plain duty to set aside the decree of the court below and apply the legal test as we see it." *Gillis* v. *Smith,* 114 Miss. 665, 75 So. 451.
>
> "The true rule in this respect is set forth in Keller *v.* Potomac Company, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: '* * * In that procedure (in equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.'
>
> "In recognition of this rule, the court in the *Hoeltke* case, *supra,* used the following language: 'We are thoroughly familiar with the salutary rule that in equity cases the findings of the District Judge on questions of fact will not be disturbed unless in our opinion such findings are clearly wrong.' See also Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c." *Edwards* v. *Lain,* 7 Cir., 112 Fed. 2d. 343.

Affirmative Statement for Trustee

We agree with the Circuit Court of Appeals that Section 67 (d) (6) of the Bankruptcy Act has no application, but if applied, the burden rests on Mrs. John B. Edmonson to prove that she was a purchaser in good faith and for a present, fair, equivalent value. Said Mrs. Edmonson did not present any testimony whatsoever. All of her testimony was that produced by the trustee in bankruptcy. She did not appear at the trial and furnish any testimony whatsoever for herself. It was the duty of Mrs. Edmonson to affirmatively plead as well as prove that she came within the exception under said paragraph 67 (d) (6) of the Bankruptcy Act. No such pleading was filed for her. See *Hummel* v. *Wells Petroleum Company,* 111 Fed. 2d. 883 (C. C. A.). This affirmative pleading also required the affirmative proof, which she did not furnish, as indicated above.

> "The burden was on the appellant, if it would save the transaction under said Section 67 (e), to prove that it was a purchaser in good faith and for a present fair consideration. * * * Appellant has failed to meet this burden." *Edward Hines Western Pine Co.* v. *First National Bank,* 61 Fed. 2d 503, (CCA Ill.).

The presumption is against petitioner, since there are involved members of her family.

> "The decision of this court in the Prosser case above cited is peculiarly applicable, in that it involved, as here, transactions between an insolvent debtor and members of his family, which are presumptively fraudulent, and call for full explanation on the part of the beneficiaries." *Bailey* v. *Blackmon,* (C. C. A. 4th), 3 Fed. 2d 252.

The Bankruptcy Act contemplates equality of distribution to all, other than fraudulent transferees.

"But in this case there was a fraudulent transfer. The saving clause in 13 Eliz. which protected innocent purchasers for value was not broad enough to protect mere unsecured creditors of the fraudulent transferee. . . . Furthermore respondent had at least some knowledge as to the fraudulent character of Downey's corporation . . . And title to the property fraudulently conveyed has vested in the bankruptcy trustee of the grantor. We have not been referred to any state law or any equitable considerations which under these circumstances would accord respondent the priority which it seeks." *Sampsell* v. *Imperial Paper & C. Corp.*, 313 U. S. 215, 85 L. Ed. 1293.

Statutory and Common Law in Mississippi Required Result Reached by Circuit Court of Appeals

The trial judge held in the original receivership hearing that the conveyances and assignment would probably have to be set aside, and a receiver was named; and in the bankruptcy hearing against the Newtons, which is a part of this record, it was held that said conveyances and assignment were made to Mrs. Edmonson to hinder, delay and defraud creditors of the Newtons. We have heretofore pointed out that she did not testify in her own behalf in the final hearing, and that she and Mrs. Newton, one of the bankrupts, were sisters and very close together, and that she put no money into the jobs from which she now expects proceeds, and that the deeds and assignment were received by her without her paying anything therefore. She further testified in another hearing that she contributed no money or property towards the three government contracts (R. 838), and as above stated, she knew nothing about the profits and losses. She did not know what she obtained through the deeds and she could identify only six pieces of property of the great number of units involved (R. 848-9). Her memory was convenient, as was her knowledge of the facts. She claimed that she could not

remember any stable facts (R. 865), and it was a common answer that she did not know (R. 869); and when the deeds were executed they were placed in safe of the bankrupts (R. 870). She did not know when the deeds were recorded or who put on the revenue stamps required by the Federal Law (R. 871). She claimed that Mr. Wills, who represented the bankrupts, and who represents her here, cared for that (R. 874), and she admitted that all of the transactions were in cash (R. 876), and although she received $5,000.00 per month as rents, no deposits were made in the banks (R. 879); and she did not know how much money she received (R. 871). She claimed that the rent money was placed in a safe deposit box (R. 873), but when the box was examined it was empty (R. 896). This was the kind of testimony which was furnished by and for Mrs. Edmonson.

> "We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the nonpayment of value for the property fraudulently conveyed." *Richards* v. *Vaccaro*, 67 Miss. 516, 7 So. 516.
>
> "A debtor being unable to pay a debt when called upon by the creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyances of property is considered fraudulent and void, and it is incumbent on the party holding such property, and insisting upon such claim, to show that such debtor, at the time of conveyance, retained other specific property, readily accessible, and ample for the discharge of all his debts, and this burden has not been met in this case." *Ames* v. *Dorroh*, 76 Miss. 187.

The Circuit Court of Appeals must have been challenged substantially by the existing badges of fraud, which must be considered together and not separately.

> "On the issue as to whether there was a *bona fide* sale from Jos. V. Lavecchia to his sister-in-law, the following well-known labels and badges of fraud are disclosed by the evidence; Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempt to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a loss of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property." *Reed* v. *Lavecchia, et al.*, 193 So. 439, 187 Miss. 413.

It should be pointed out that the contracts of 1942, which constitute the basis for Mrs. Edmonson's claim, identify her and other members of the Newton family as "silent partners" (R. 216-19), and that the three deeds had recited consideration therin of $10.00, with the two F. T. Newton deeds covering identical properties, and revenue stamps on each of $11.00 (R. 114-125), and the deed of Mrs. Newton to her sister had the $10.00 consideration, with $9.90 of revenue stamps (R. 131). The consideration, according to the revenue stamps, amounted to around $27,000.00, but covered property valued by the district judge at $451,000.00 (R. 894). The deeds are dated August 23 and the assignment September 22, 1943, and same were filed for record on October 6, 1943. The transfers covered all of the real estate of the Newtons excepting the homestead. The Newtons retained possession until October 16, 1943, being the time when they defaulted with the Government, and the trial judge gave a special finding of fact that the grantors

"retained benefits flowing from the property in that they gave no notice of the conveyances or assignment and continued to collect rents and retain same until the default of the Newtons on October 16th, 1943." (R. 932). This court has recognized the principle that the law will not permit a debtor to sell his land and reserve secret benefits after delivery of deed, and in an old case two Mississippi cases were quoted by the Supreme Court of the United States, with approval in this regard. This, in itself, required the Circuit Court of Appeals to reach the conclusion now complained of.

> "The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed, without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit. Wooten *v.* Clark, 23 Miss. 75; Arthur *v.* Com. & R. R. Bk., 8 Sm. & M. 394; Towle *v.* Hoit, 14 N. H., 61; Paul *v.* Crooker, 8 N. H. 288; Smith *v.* Lowell, 6 N. H., 67. Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belong to his creditors." *Lukins v. Aird*, 18 Law Ed., 750. See also Dent *v.* Ferguson, 33 Law Ed., 242.

There are many other badges of fraud found through the record, including inadequacy of consideration, and alterations appearing on the deeds, and failure of Mrs. Edmonson to pay taxes on the property after she received the deeds, and the fact that the Newtons took all of their Government bonds and placed them with Reuben L. Newton, brother of

F. T. Newton, with result that he finally claimed that he had Mrs. Newton, one of the bankrupts, to cash the bonds and give him the money, which he buried in a jar on the lawn of his home in Jasper, Alabama. These facts do not add up to good faith or present consideration. Under these facts, the Edmonsons cannot now claim to this court that on the equity side of the docket of the United States District Court they had shown any equity on their side. It is a case where the Newtons and the Edmonsons, as very close families, tried to figure out a way to place property beyond the reach of creditors and to make it impossible for creditors to recoup the relatively small amount of property compared with the debts.

We have here first contended that no binding partnership agreement existed between the Edmonsons and the Newtons, and that the Edmonsons were entitled to no economic benefits therefrom. Our second contention is that the existing facts, including the adjudication of the Newtons as bankrupts, and the method of handling the deeds and the assignment, and the relationship of the parties, and other existing facts identified in this argument, require the conclusion that the conveyances were fraudulent and void and properly set aside by the Circuit Court of Appeals. Our third contention has been that, under the Mississippi and common law, the deeds and assignment were and are fraudulent conveyances, without consideration and void. The trial court found as a fact that the consideration for the deeds under the contentions of the Edmonsons was inadequate. He also found as a fact that after the delivery of the deeds and assignment the Newtons, as grantors, continued to collect rents at the rate of $5,000.00 per month, and continued to exercise control over the property conveyed until October 15th, 1943, when the Newtons defaulted on their twenty-three existing Government contracts. If the opinion of the United States Circuit Court of Appeals is upset, the Edmon-

sons and Newtons will continue to own the real estate valued by the trial judge at $451,000.00, and creditors with probated claims aggregating more than $2,000,000.00 will get absolutely nothing. This cause arose in a court of equity. On equitable principles, as well as on legal principles, the Circuit Court of Appeals had no election but to do what it did.

Conclusion

The Circuit Court of Appeals has committed no error. Said court has not decided "an important question of local law in a way probably in conflict with applicable local decisions;" and it has not decided "an important question of Federal law which has not been, but should be settled by this court." We submit that the petition for writ of certiorari is not well taken and should be denied.

Respectfully submitted,

T. C. HANNAH,
Hattiesburg, Mississippi;
M. M. ROBERTS,
Hattiesburg, Mississippi,
Of Attorneys for Respondent.

The undersigned T. J. Wills, attorney for petitioner, acknowledges receipt of copy of brief of respondent on this the 11th day of September, A. D., 1947.

T. J. WILLS,
Hattiesburg, Mississippi.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

RESPONSE OF G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS, TO AMENDED PETITION FOR WRIT OF CERTIORARI.

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The respondent respectfully represents and shows to the Court:

I

Objections to Sufficiency of Amended Petition for Writ of Certiorari

1. The amended petition does not conform to the requirements of Rule 38 of this Court:

(a) In that said Rule has not been complied with as set forth in response to original petition under paragraphs

1(a), (b), (c) and (d), which parts of original response are here adopted.

(b) There has been failure to comply with Rule 38(2) and (3), in that the permission for filing the amended petition was allegedly obtained on September 5th, 1947, and the said amended petition was not filed within the time contemplated under the rule before or after the Court convened.

2. The amended petition and brief thereto were not mailed to the Clerk of this Court until November 12th, 1947, which was long after the permission was allegedly granted; and the petitioner and/or attorneys gave no notice to respondent or his attorneys of the application for such permission either before or after the alleged grant thereof, and the first notice to the trustee or attorneys for the trustee was obtained through copy of letter of the Honorable Horace C. Wilkinson to the Honorable Charles Elmore Cropley, Clerk of this Court, dated November 12th, 1947; and this conduct violates the rules of this Court and a proper interpretation thereof, and the amended petition and brief should not be considered by the Court, and the original application should be denied.

II

Response to Amended Petition for Writ of Certiorari

The arrangement of amended petition differs with original petition, and attorney preparing amended petition seeks to identify the three volumes of bankruptcy record proper by the letters "B. R.", and this cause by the letters "E. R." for Edmonson Record, and this is contrary to our plan in response to original petition, and we shall adhere thereto by making reference to the record created and partially printed in this cause in two volumes by the letters "R. R.",

and we shall conform to our previous handling and the handling by petitioner in referring to the three bankruptcy volumes by the letters "B. R."

"SUMMARY STATEMENT OF MATTER INVOLVED"

Under the last above identified heading, it is stated that the case involves the validity of three written contracts made by F. T. Newton with Mr. and Mrs. John B. Edmonson, and the validity of two deeds of Newton to Mrs. Edmonson, dated August 23, 1943, in settlement of Newton's liability under the contracts. The facts are that there were three papers signed with F. T. Newton on one side and Mr. and Mrs. Edmonson and others of the Newton family on the other, as related to three Federal wartime contracts, but there were three deeds instead of two covering all of the real estate owned by Mrs. Newton, sister of Mrs. John B. Edmonson, named grantee, and by Mr. Newton, with two deeds covering the same identical property executed by Mr. F. T. Newton to Mrs. John B. Edmonson (R. R. 102-130). There is nothing in either deed to show that same was given in settlement of Newton's liability. The named consideration in each deed is "Ten ($10.00) Dollars and other good and valuable considerations." The Federal Revenue stamps on the F. T. Newton deeds are three in number, aggregating $11.00, and the revenue stamps on the deed of Mrs. Ethel Flurry Newton, being the same as Mrs. F. T. Newton, aggregate $9.90. If the consideration was intended to include the $104,099.58, now claimed to have been included, in addition to the alleged assumption of incumbrances of approximately $85,000.00 against the said properties, the revenue stamps do not reveal this, and as is well known to the opposition, there is not one single record of the conveyances or of the alleged obligations growing out of the three alleged contracts. All was had

and done by word of mouth without a single scratch of the pen, to permit the strained and forced interpretation now wanted so much by these parties.

The Honorable Horace C. Wilkinson, who has apparently prepared the amended petition for writ of certiorari, is not familiar with the facts and the record, as is disclosed by his statement that there was incorporated in this cause before the trial court the three volumes of transcript of record in Case Number 11,306 in the United States Circuit Court of Appeals for the Fifth Circuit, being the case where the Newtons were adjudged bankrupts, 149 F. (2d) 879, certiorari denied in this Court, 326 U. S. 758. There was included all of the testimony in said bankruptcy cause, and substantial parts thereof were eliminated from the printed record, now appearing in three bound volumes.

It is stated under this heading that the Edmonsons are out $104,099.58 because of the fact that the United States Circuit Court of Appeals for the Fifth Circuit reversed the district court and remanded the cause, with directions to set aside the transfers and to deny the claim of the Edmonsons. In truth, the Edmonsons are out nothing. The first of the three alleged contracts identifies the Edmonsons as two of "six silent partners" (R. R. 216-219). The second of these contracts was prepared to be signed by the same six parties, and referred to them as "six silent partners," but in truth only Edmonson and his wife signed, and the same is not acknowledged or recorded, and evidently was signed after the default with the Government (R. R. 221-224). The third contract again refers to the Edmonsons as silent partners, and there is no acknowledgment and no recordation. These are the writings to which petitioner refers in the amended petition.

The statement is made that Mr. and Mrs. Edmonson's share of the proceeds on the three jobs was $104,099.58. Reference is first made to the audit of R. G. Wooten, repre-

sentative of the Newtons and the Edmonsons, as it appears at page 1174 of the bankruptcy record. That audit covers records of accounts in the office of F. T. Newton for the year ending December 31, 1942 covering the three contracts; and at that time these three jobs were not completed. Reference is also made to the decree of the court as it appears at page 933 of the receivership record bearing Cause Number 11,905 in the Circuit Court of Appeals. The district judge had no proof to show the amount of proceeds on the three jobs, if there were proceeds. The district judge did have before him the audit made for the Newtons by Dumaine, auditor of New Orleans, Louisiana, which did not take into consideration $600,000.00 to subcontractors, and in connection with said audit made to cover status of the Newtons as of August 31, 1943, Dumaine recognized that the books and records of the Newtons did not disclose the status of the business (B. R. 1361); and that the books showed that Newton had $150,000.00 in a Memphis Bank at a time when he was overdrawn $50,000.00 (B. R. 1365), and Dumaine was unable to use any of the Newton books and only some of the records (B. R. 1363), and the Arkansas Trust Company Bank account of Newton's books showed $100,000.00 more than there was in the bank, and the records against the National Bank and Trust Company at Pine Bluff, Arkansas showed a balance of $150,000.00, when in fact there was only $15,000.00 on deposit (B. R. 1368), and Dumaine admitted that the books were out of balance on bank accounts alone nearly $1,000,000.00 (B. R. 1377), and Dumaine had no knowledge of the $600,000.00 to subcontractors (B. R. 1377), and Dumaine valued Newton's real estate at $25,000.00 when there were no book records of this and F. T. Newton gave him the figure (B. R. 1407), and the audit showed taxes amounting to $35,395.00, when in fact there were Federal taxes alone in excess of $225,000.00. The witness did not take into account any claims of T. E.

Newton, Phillip Newton, Carol Newton, Reuben L. Newton and Mr. and Mrs. John B. Edmonson under contracts or otherwise, because their names did not appear on the books and records of Newton and the auditor never heard of such claims (B. R. 1417). He knew nothing about the bond transactions wherein the Newtons and Edmonsons cashed in and ridded themselves of all the bonds they held (B. R. 1418). These facts are evidently not known to the Honorable Horace C. Wilkinson, preparer of the amended petition and brief.

Reference is made to the finding of the district judge with respect to the interest of the Edmonsons; but the district judge failed to recognize the facts about related, and which facts were presented to the Circuit Court of Appeals out of the record itself, for their consideration and determination of the rights of the parties. It should be stated that the same district judge in the bankruptcy cause held that a court can reach no other conclusion than that the conveyances were made "to hinder and delay creditors in the collection of their debts and the law thereupon presumes that they were fraudulent" (B. R. 1655-1658). On appeal, the Honorable Edwin R. Holmes for the Circuit Court of Appeals held that the bankrupts were guilty of conveying their property and concealing same "with intent to hinder, delay and defraud their creditors." *Newton, et al.*, v. *Glenn, et al.*, 149 F. (2d) 879.

The question arises as to the knowledge of the Edmonsons prior to August 23, 1943, the changed date on the deeds. Edmonson stated that the Newton books "were in a mess" (R. R. 486), and Edmonson "was disturbed about it" (R. R. 487), and Edmonson "took what was offered" because he "didn't know just where he was at" (R. R. 488), and the Edmonsons were inquiring about Newton's solvency "for the simple reason that we would like to know his financial condition" (R. R. 491). And before the Edmon-

sons ever negotiated for the deeds, he could not know whether Newton was solvent or insolvent, "I could not tell. I hadn't been able to find that out," and he did not know if Newton could pay his debts as they matured (R. R. 492), and with these facts, the Edmonsons took all they could get from the Newtons (R. R. 493). After the deeds were delivered, Edmonson did not know if his wife received any of the rent monies (R. R. 497-8), and he never heard any rent money mentioned by his wife, and the Newtons continued to occupy the office space in building conveyed in one of the deeds (R. R. 498-9), and the record is full of these kinds of admissions on behalf of the Edmonsons, with no stronger proof on their part. They must have known of the condition of the Newtons when the deeds were delivered. They, at least, knew enough to charge them with notice thereof. Mrs. Edmonson appeared before the referee in bankruptcy, and most of her answers were to the effect that she did not remember, and she remembered so little that the referee in bankruptcy finally said to her: "You can give the court some idea what you got in some months. There is no rhyme, reason or excuse for your answering 'I don't know' to every question. You must give the court the benefit of what you know, within limits, and you do know something" (R. R. 881). It is under this kind of record that the Edmonsons are trying to get this Court to consider paying to the Edmonsons more than $104,000.00 on the scheme outlined for the Edmonsons by the Newtons and Edmonsons and their attorneys, and this is being called for at a time when there are unpaid probated claims of $2,387,491.32 against the estate, with probated Federal tax claim of $225,643.34 (R. R. 823), and less than $100,000.00 to use in the payment thereof if the Newtons and Edmonsons prevail in this litigation.

"Questions Presented"

Respondent denies that the Edmonsons had a claim for $104,000.00, and denies that the three contracts were supported by lawful considerations, and denies that the deeds were supported by valid considerations, and denies that the Newtons did not owe the Memphis Bank as claimed, and denies the bona fides of the transaction insofar as Mrs. Edmonson or her husband were concerned, and denies that either Mr. or Mrs. Edmonson is entitled to any relief whatsoever.

"Reasons Relied on for Allowance of Writ"

Respondent claims and contends that the existing facts do not permit application of principles appearing in case of *Burnet* v. *Leininger*, 285 U. S. 136, and respondent claims and contends that the United States Circuit Court of Appeals was eminently correct under the facts, and that the case of *Storm* v. *U. S.*, 94 U. S. 76, has no application; and respondent denies that there was a decision of a federal question by the United States Circuit Court of Appeals for the Fifth Circuit, in this cause, which in any way conflicts with applicable decisions of this Court, as is disclosed by the record; and respondent denies that said court of appeals departed from usual course of judicial proceedings when it set aside the judgment of the district court, and as will be hereinafter set forth, the said court of appeals had no election but to enter the opinion and order as entered; and respondent denies that Section 107 (d) of the Bankruptcy Act has any application whatsoever to the facts of this cause, and respondent denies that the petition has any foundation in law or fact, and he prays that the petition be denied.

III

ARGUMENT FOR RESPONDENT

Edmonsons Had No Valid Claim under Contracts

Under the first proposition of petitioner in amended petition, it is claimed that the Edmonsons were claiming under three valid contracts, and in support thereof it is pointed out that these contracts may be considered either equitable assignments, or subpartnership agreements, or agreements covering joint adventure. We fully appreciate that there could have been an equitable assignment, or a subpartnership agreement, or a joint adventure, but we first claim, as the Circuit Court of Appeals held, that there was no consideration for these contracts, and that they were entered into with view of avoiding the payment of taxes, and that same were mere subterfuges and fraudulent and void. There is ample of uncontradicted testimony in the long record to justify this conclusion; and in this connection, it must be pointed out that Mrs. Edmonson, who is the petitioner here, never gave any testimony to support the claims now being made by the attorneys that there was a good faith transaction. It should be pointed out that the partnership of Newton & Glenn consisted of F. T. Newton, Mrs. F. T. Newton and F. S. Glenn, and this was the conclusion reached by the trial judge and by the United States Circuit Court of Appeals in the bankruptcy cause, reported in 149 F. 2d, page 879, and against which certiorari was denied by this Court, and record thereof appears in Volume 327, U. S. Reports, page 758. The Mrs. John B. Edmonson now seeking to hold most of the property of the bankrupts against the trustee is a sister of Mrs. F. T. Newton, and Mr. and Mrs. Edmonson and Mr. and Mrs. Newton have been working together with view of trying to defeat the trustee in assembling assets for the creditors. In the

opinion of the United States District Judge in this very cause it was stated that "These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted" (R. R. 925). As the Circuit Court of Appeals held, these so-called sub-partnership contracts were without consideration and void; and the court on appeal recognized that there was no proof to show profits on the particular contracts because the R. G. Wooten audit only included period to December 31, 1942, and these Government projects were only ninety-five per cent complete on August 15, 1943, when said audit was dated. The discussion about sub-partnership rights, therefore, has no place in this record, because of absence of proof to support same.

There existed no community of interests between the Newtons and the Edmonsons. F. T. Newton reserved to himself control over the business. There did not exist any mutual agency, and as before stated, the trial judge held that the arrangement was entered into with view of avoiding taxes. The Supreme Court of Mississippi has held in the case of *Cudahy Packing Co.* v. *Hibou,* 92 Miss. 234, 46 So. 73, that the contracting for a share of profits does not constitute a partnership, if the parties do not intend a community of interest. A similar position is indicated in text of 47 C. J., 669-70. The second phase of this first contention of petitioner is that the three contracts were each supported by a valid, lawful consideration. No one would argue against statement that mutual promises existing between contracting parties, when performed by one, would be sufficient to require an enforcement for performance by the other; but that is not the state of facts here. In the first place, the contracts falsely stated that Newton and Glenn was composed of F. T. Newton and F. S. Glenn. In the second place, the alleged contract states that it was necessary for F. T. Newton to acquire additional capital,

but the proof shows, as admitted by petitioner, that there was no sharing of capital, and in addition thereto it is provided that:

> ". . . F. T. Newton is to conduct and manage the construction and carrying out of said contract in accordance with his own judgment of the same and that the said F. T. Newton shall have full power to control said construction in every particular and it is hereby agreed that the power of attorney for and on the part of each of the above two parties is hereby invested in the said F. T. Newton to execute full determination and control of said construction provided for in said contract. . . ."

It is further provided that said parties are "silent partners" (R. R. 226). In other words, the parties themselves contracted against creditors having knowledge of the existence of such contracts, and there are now more than $2,000,000.00 of claims probated against the estate of the two bankrupts, and petitioner is trying to take away the real estate valued at $450,000.00 for her own benefit, under this secret arrangement made to avoid Federal taxes, to the exclusion of the creditors who had no knowledge of the contract, and who would never know about the same under the terms and provisions thereof.

There is further discussed the question of consideration for the said contracts. We have already mentioned that nothing was furnished towards the construction of the three Federal projects identified in the three alleged contracts. Even petitioner now admits before this Court that the money was to be furnished by the Memphis Bank, and she contends that the Memphis Bank had no election but to furnish the money irrespective of the method and manner of the carrying on of the work for the Government by Newton. It is unusual that the books and records of Newton carried no reference to the alleged contracts. The auditors examining

the books, including Dumaine, employed for the Newtons and Edmonsons, found nothing of record about these writings. Mrs. Edmonson, who is petitioner here, put no money in the three contracts, and she put no work on either of the three jobs (R. R. 836); and there was no money passed, or interest of any kind passed when the contracts were signed (R. R. 837); and Mrs. Edmonson made no contribution whatever to the three jobs, either of money or property (R. R. 836). She did not even know that the jobs were begun in 1942, but she identified 1943 as the beginning of the contracts (R. R. 839). She knew nothing about the profits and losses on the separate jobs (R. R. 842). She did not know if there was anything in the contracts to provide that she would share in the losses, and if there was any such provision she knew nothing about it (R. R. 844). The law cited by petitioner is good law, but it does not fit the facts of this case, and has no application here.

Newton Did Owe the Memphis Bank Approximately $1,500,000 at the Time the Deeds Were Executed and Delivered to Mrs. Edmonson.

Under the above heading, stated in reverse, there is contained petitioner's "Proposition II." The trial court and the circuit court of appeals have recognized that the Union Planters National Bank and Trust Company had a claim against the Newtons for approximately $1,500,000.00. The testimony in the first receivership trial which resulted in appointment of receiver to take over the very property here involved, discloses the indebtedness due to said Memphis Bank of $1,531,171.89 (R. R. 139). This was never disputed by the bankrupts or Mrs. Edmonson, and on page 148 of the original receivership record, being volume one of printed record of said United States Circuit Court of Appeals No. 11,905, there are identified, item by item,

the notes payable to make up this sum, and incidentally, it is there shown that as of October 13, 1943, just one week after the deeds in question were recorded and became effective as to creditors, there was still due to said Memphis Bank for unpaid notes of Newton & Glenn the sum of $79,765.95 (R. R. 148). It is claimed by petitioner that letter of July 24, 1943 bound the Union Planters National Bank and Trust Company to furnish money to extent of $1,500,000.00. The question arises as to whether or not the Memphis Bank had a right to refuse to make payroll advance of $225,000.00 to F. T. Newton on Brunswick, Georgia Federal Project on October 16, 1943, after it had developed that the Newtons had conveyed away all of the real estate which they owned, and valued at $451,100.00, with furnishings therein valued at $30,000.00.

To understand the attitude of the trustee and his attorneys in connection with any claim against said bank, it should be pointed out that the United States District Court, prior to the filing of the amended petition and brief affected hereby, in a hearing participated in by the Honorable Horace C. Wilkinson, held that the bankrupts, and/or the trustee had no claim against the Union Planters National Bank and Trust Company. Before the said district judge and before this Court is the entire bankruptcy record, and a part of which appears in three bound volumes as aforesaid.

The only basis of Newton for claim against the Memphis Bank has to do with letter of July 24, 1943, affecting line of credit, which letter provides that a line of credit of $1,500,000.00 has been set up "subject to usual credit reservations and to the acceptance of the assignment of the contract by all necessary parties and the consent of the Bonding Company" (B. R. 659). The assignment used for Newton & Glenn prior to March 1, 1943, and for F. T. Newton, General Contractor, after said date, was on the

same general form, and the assignment in itself recognizes the right of the bank to lend or not to lend as it saw fit, as disclosed through one paragraph that:

> "This assignment is made for the purpose of securing payment to the Union Planters National Bank & Trust Company, Memphis, Tennessee, of such sums as said bank may elect from time to time to lend to the assignor to enable it to go forward with and perform said contract." (B. R. 315.)

In other words, the duty of the bank to lend was subject to the usual credit reservations and subject to its own judgment in connection therewith, as identified in each separate assignment on the several Federal Projects. In spite of this fact, the preparer of the amended petition affected hereby, because of his failure to have full knowledge of the facts as disclosed in the record, is contending that the Circuit Court of Appeals is in error. He says that it is inappropriate for the Circuit Court of Appeals to identify the debt at $1,500,000.00 as of August, 1943, and he seems to want to contend that the debt to said bank in August of 1943 ought to be identified as $1,360,003.93, as fixed in the Dumaine audit prepared by said Dumaine for the Newtons and used in the bankruptcy trial (B. R. 1228), but the indebtedness of principal and interest actually aggregated more than $1,500,000.00 when principal and accrued interest were added together (B. R. 1755). Said attorney is also confused about there being a suit against the Memphis Bank. There is no such suit in existence, and the district court has held that under the aforementioned assignment and letter, and based upon the bankruptcy record, the trustee has no claim against said bank. This is known to Mr. Wilkinson, who has participated in a hearing in this regard.

Substantial of space is used by petitioner to try to show that the $1,500,000.00 item ought to be divided into

three parts, so that the First National Bank of Atlanta and the American National Bank of Nashville would be identified as claimants. This is again evidence of a failure of understanding of the facts by Mr. Wilkinson. All notes were executed by the Newtons or Newton & Glenn, in favor of the Union Planters National Bank & Trust Company of Memphis, Tennessee. The Nashville bank and the Atlanta bank only participated with the Memphis bank in the handling of the monies, but all of the money actually cleared through the said Memphis Bank, and constituted part of the debt of the Newtons. It is true that the Union Planters National Bank & Trust Company only probated claim of $1,100,422.91, and the National Surety Corporation only probated claim for $663,678.83, and the Maryland Casualty Company only probated claim for $260,082.50 (R. R. 821); but the United States of America paid unpaid balances on Government contracts to the surety companies and banks on some kind of arrangement. The probated claim itself of the bank, which is a part of this total record, shows the details of the participation by the Atlanta and Nashville banks. This mistake in argument would not have been made by the Honorable T. J. Wills, of attorneys for the Newtons and Edmonsons, because of the fact that he understood and knew of these parts of the record.

After all, this question of the size of the bank's claim has nothing to do with the controversy here. This question of the bank's claim was not in issue. There is nothing in the pleadings and nothing in the proof which was before the trial judge or before the Circuit Court of Appeals to bring into play the discussion here presented in amended petition by the Honorable Horace C. Wilkinson. We have only referred thereto, as we are referring to a number of other matters not in issue, simply because of Mr. Wilkinson's reference to same, and this in spite of the fact that

same are not germane to the issue, and have no place in a petition for certiorari in this cause.

Some reference is made under Proposition II d of amended petition to a claimed oral understanding had by the Newtons and the Memphis Bank with reference to the advancement of monies. This really has no place in the record, but the so-called letter of credit dated July 24, 1943, from said bank to Newton (B. R. 659), plus the assignment (B. R. 315), constitute the basis for the contentions of Newton. It was Mr. Newton's testimony that the bank loaned him money against assignments (B. R. 657), and Newton further stated that he had an agreement, and we called for the agreement, and then this question was asked of Newton: "Is that what you are talking about—that is the agreement you had with the bank?" and his answer was "Yes sir" (B. R. 658); and the letter was introduced as Exhibit 39 to plaintiff's record, and it appears in the bankruptcy printed record at pages 659 and 660. Every single advance or loan made by the Memphis Bank, either to Newton & Glenn or to F. T. Newton General Contractor, was evidenced by a separate note, and a general statement of all of these advances, showing credits on the several Federal jobs identified, discloses that the total debt due said Bank by Newton and Glenn and F. T. Newton, as of August 15, 1943, was $1,878,003.14 (R. R. 810). By September 15, 1943, the debt had been reduced to a little more than $1,600,000.00, and by October 16, 1943, the debt had been reduced to a little more than $1,500,000.00. As of the date of the Wooten audit of August 15, 1943, Newton & Glenn, affected by the three alleged contracts, owed the Memphis Bank $285,405.07. However, the Wooten audit, relied on by petitioner, did not take into account this figure, because it only covered period ending with December 31, 1942, as hereinbefore set forth.

It is unusual that the opposition here is claiming that the Memphis Bank owed Newton more than $2,000,000.00, when in fact, Newton and his wife are insolvent and are bankrupts, and have claims of more than $2,300,000.00 probated against them; and the property they owned, and which should be used to pay said debts, is involved in this litigation growing out of a flimsy concoction planned, as was held by the district court as aforesaid, to avoid income taxes. Reference is made to the letter of May 31, 1944 to the Memphis Bank by Newton, and prepared under the supervision of his lawyer, and which in truth is child play in disguise (B. R. 1528).

Mrs. Edmonson Did Intend to Defraud Creditors of Newton on August 23, 1943

Under this third proposition in argument, where the attorney is seeking to wash clean the hands of Mrs. Edmonson of the fraud of the creditors, he is overlooking the record when he asserts that the agreements with the blood relatives of the Newtons and the agreements with the blood relatives of the Glenns were identical, in that both Newton and Glenn were attempting to minimize the amount of income taxes, and were using this subterfuge to reduce their income taxes; and he is mistaken when he says that nothing in the record can be twisted or distorted into an intimation that the Edmonsons knew that Newton was expecting to encounter economic difficulties. There are so many circumstances to require a different conclusion. These contracts were not executed by Mrs. Newton. She owned more than half of the real estate, and she gave away her real estate to her sister, just as her husband gave his real estate to her sister, at a time when Newton was wholly insolvent, and at a time when Newton purposely made these transactions along with his wife to hinder, delay and defraud their creditors. All of the argument of petitioner about the good faith

of Newton is out, because the entire bankruptcy record is before the court, and the trial court and the Circuit Court of Appeals held in the bankruptcy suit that Mr. and Mrs. Newton were guilty of making these conveyances to hinder, delay and defraud their creditors. The trial judge had made this finding, and the Circuit Court of Appeals for the Fifth Circuit reexamined the record now before this Court and came to the same conclusion. 149 F. (2d) 879. The bankrupts filed petition for writ of certiorari before this court, and which petition was denied, 326 U. S. 758; and there was presented to this Court in that case a number of decisions respecting the "two-court rule" followed here. The "two-court rule" and the adjudications had against the bankrupts cannot permit of claims by Mrs. Edmonson that Mr. and Mrs. Newton were other than defrauders of their creditors.

> "The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their findings are not to be disturbed unless clearly erroneous." *United States of America* v. *Commercial Credit Company*, 76 L. Ed. 978, 268 U. S. 63.

See also *Alexander, Administratrix, et al.*, v. *Spencer Kellogg & Sons, Inc.*, 76 L. Ed. 903, 285 U. S. 502, 510; *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company*, 88 L. Ed. 721, 321 U. S. 275, 278; and *Anderson* v. *Abbot, et al.*, 88 L. Ed. 793, 321 U. S. 349, 356.

Since there has been the final adjudication against the Newtons that they are guilty of defrauding their creditors, and the conduct of Mr. and Mrs. John B. Edmonson in dealing with these defrauding bankrupts must be looked upon with suspicion, they have the burden to show that the Edmonsons, too, were guiltless, and as already stated, their testimony in itself requires the conclusion that they, too, were trying to get away with all of the property that they

could, with view of protecting the defrauding Newtons, who were members of their family identity.

Complaint is made against the Circuit Court of Appeals because of its conclusion that the proof was not sufficient to show that there were any profits in the three jobs. The court had first concluded that the contracts were not enforceable, but if enforceable, the court further held that the record was absent of proof to show the amount of the profits. Petitioner refers to the Wooten audit (R. R. 86). We have already shown to the court, from the record, that none of these contracts were completed on December 13, 1942. In fact, these were unfinished contracts when the Government took over on October 16, 1943; but the Wooten audit only covers the records of accounts "in the office of F. T. Newton" for the year ending December 31, 1942. These records were out of balance according to their witness Dumaine on cash items alone of more than $1,000,000.00, and the jobs were not completed during the period covered by the audit. The Wooten audit, therefore, constitutes no proof whatsoever.

Complaint is made about the holding of the Circuit Court of Appeals that Mrs. Edmonson joined with the Newtons to strip them of their property. We must first recognize that said court knew that the Newtons were guilty of fraud. They knew from the record that if they assumed the contracts to be binding, Mrs. Newton was not a party thereto, and she gave away all of the real estate just as did her husband. They also knew that these alleged contracts were not only in favor of J. B. Edmonson and Mrs. Edmonson, but these contracts were likewise in favor of four other members of the Newton family, namely, Phillip Newton, son of F. T. Newton, Carolyn Lewis Newton, daughter-in-law of Newton, T. E. Newton, father of Newton, and Reuben L. Newton, brother of Newton. These parties were all

identified in the Camp Campbell, Tennessee contract (R.R. 217). Their names were identified in the Greenville, Mississippi project, but haste evidently kept their signatures off the attempted contract (R.R. 221). Their names did not appear in the Rohwer, Arkansas project (R.R. 225). Approximately half of the alleged profits under the Wooten audit came from Clarksville, Tennessee, but the Newtons did not take care of the father, brother, son and daughter-in-law in the conveyance of real estate. The Edmonsons took all of the real estate, to the exclusion of the other parties to the contracts, according to their own admissions, and left out in the cold their fellow contractees, if their stories and contentions could prevail. And, if we believe the stories told, the Government Bonds owned by the Newtons were turned over to Reuben L. Newton, either directly or indirectly. At first, the bonds amounted to $15,500.00 (B.R. 601). Later the bonds were increased to $40,000.00, with Reuben L. Newton in possession thereof (R.R. 616-17). The story of Reuben L. Newton in connection therewith is a weird one. Mrs. Newton is said first to have returned to him $30,000.00 in money (R.R. 628). Subsequently, it developed that the Treasury Department of the United States had cashed bonds of maturity value of $44,425.00, and Mrs. Newton had received $38,029.25 in money (R.R. 99). They claim this money was carried by Reuben L. Newton to his home in Jasper, Alabama, where he practices law, and there, without the knowledge of his wife, he buried the money on his lawn, and it stayed there until it was dug up, according to Newton, after he had to tell his story in court (R.R. 632). Even that story is unworthy of belief; but if it were true, Phillip Newton and his wife failed to get their part of the money. They failed to get their part of the property. When the Newtons and Edmonsons needed a lawyer, they hired the Honorable T. J. Wills, with view of getting him to uphold the real estate transactions (B.R.

765). During all of this time, the Newtons had access to the Edmonsons' automobile (R.R. 465). The name of Edmonson was loaned to Newton to carry on the business of the Mississippi Electric Company, a trade name of the Newtons, used to violate Government regulations in that the Newtons would become the contractor and use their own trade name as basis for subcontract (R.R. 577). The record is full of these great inconsistencies, constituting wrongful conduct on behalf of the Edmonsons as they cooperated with the Newtons to try to defraud the creditors. No other conclusion could be reached than that reached by the Circuit Court of Appeals as to the fraud of the grantee. In view of all of the above, we contend that there is no reason or basis for sustaining petition for writ of certiorari.

In view of the fact that the petitioner seems to want to contend that there cannot be charged to Mrs. Edmonson any fraud, we hereafter present the affirmative position taken by us before the Circuit Court of Appeals.

IV

Affirmative Statement

As heretofore indicated, we respectfully submit that the statement of petitioner is such as to preclude this court from getting a comprehensive understanding of the questions involved; and the separate items discussed deal, not with the whole litigation as viewed by the Circuit Court of Appeals, but with isolated identities of facts which do not furnish measure used by courts generally in determining rights of the parties. In 1940, Newton and Glenn formed a partnership, and Newton began with his wife to receive two-thirds and Glenn one-third of the profits.

(1) The Newtons were to receive two-thirds of the profits because they were to furnish the finances.

(2) It was in July of 1941 when the Newtons instructed the accountant for the partnership to list all real estate of

both Mr. and Mrs. Newton as partnership assets, and to show F. T. Newton and Mrs. Newton as partners with a one-third interest each, and this was done, and the very real estate later deeded to Mrs. Edmonson was dedicated to payment of partnership debts, and this financial statement of the auditor was used to get credit (B.R. 243-4). Thereafter, income tax returns disclosed that the business operations carried on this division. The income tax return to the State of Mississippi for 1941 shows that the profits were divided into three parts (B.R. 879). The income tax returns for 1942 were handled in the same manner (B.R. 835). So when the alleged agreements were made between F. T. Newton and the Edmonsons and other members of the Newton family, there was a misstatement of facts, and Newton did not have a two-thirds interest, and there was a misstatement when it was provided until that the contract was necessary to assist Newton in acquiring additional capital, because Newton did not acquire one single penny of additional capital because thereof, but the partnership of Newton & Glenn, composed of the Newtons and Frank Glenn, got the necessary capital by executing notes and security. As hereinbefore stated, these agreements were primarily entered into for the purpose of avoiding income taxes. Therefore, these so-called agreements were void from the beginning, as the Circuit Court of Appeals recognized.

(3) The Circuit Court of Appeals accurately determined the facts, and clearly answered the questions involved. The court recognized that if the trustee would concede for the sake of argument that the agreements were legal and binding, still the conveyances were fraudulent and void. The court on appeal held that the Edmonsons did not and could not have any title to or interest in the profits until they were realized and actually paid over to them. Our opponents

challenged the correctness of this statement by the citation of authorities. The futility of these arguments and citations lies in the fact that said arguments and authorities have no application to the facts reflected by the record. Our opponents have failed to see and weigh and consider these pregnant facts.

(4) In 1942, when Newton and Glenn were carrying on the partnership business and constantly incurring new obligations, it did not lie within the power of Newton to withdraw any of his capital, as this silent arrangement with members of his family sought to do; and what he could not do directly, he could not do indirectly through the Edmonsons and other relatives.

(5) These alleged partnership agreements of the Newtons, even if valid, did not retard or restrict the partnership of Newton & Glenn in carrying on its business, and it was perfectly legal for Newton, Mrs. Newton or Glenn to assign or hypothecate the proceeds of any contract for operating capital. This is exactly what was done, and the monies were all assigned to the Union Planters National Bank & Trust Company, of Memphis, Tennessee, and there is still unpaid to said bank in excess of $1,000,000.00.

(6) And it should be pointed out that on March 1, 1943, Frank Glenn retired from the partnership, and Newton agreed to pay all the debts of the partnership, and Mrs. Newton guaranteed this obligation of her husband.

(7) About the 15th of March, 1943, R. G. Wooten, an expert tax attorney, was employed by the Newtons in connection with income tax returns. Wooten found that the Newton books were out of balance. He put two accountants to work, and it was not until August 15th of 1943 that he was able to get out any kind of statement.

(8) In answer to inquiry of R. G. Wooten, expert tax accountant and attorney representing the Newtons and the Edmonsons, he recognized that he could not know the rights of the parties, and he had to depend upon what he was told by the Newtons as to the rights of the parties. His testimony, of value here, is as follows:

"Q. Do you tell the Court and jury now when you made up the statement on August 15, 1943, that Mr. Newton was legally obligated to account to Mrs. Edmonson on a basis of profit of $200,582.84 in that contract?

"A. From what they told me, that is what they were entitled to. They were not supposed to be renegotiated. I didn't read all the contracts; I don't know what the contracts, except the rate, carried; I was too busy to go into a lot of detail other than there was a contract and rate of profit. As far as the whole thing was concerned, I knew nothing about it.

"Q. What do you mean by 'they' when you say 'they told you'?

"A. Mrs. Newton told me.

"Q. She delivered the contracts to you as tax accountant and attorney, and you prepared the income tax returns and prepared the statement for Mr. and Mrs. Edmonson on the basis of what Mrs. Newton told you?

"A. Edmonson and his wife were in there at the time when they told me; that is no more than a compilation made based upon what they claim; I don't know anything about it other than what the figures show.

"Q. You did not read the contract to see what they provided?

"A. No, except to see the ratio." (B. R. 1214).

"Q. You said you took the deductions on the income of Mrs. Newton and Mr. Newton on account of J. B. Edmonson of the sum of $2500.00, or a total of $5,000.00?

"A. That was based upon the two contracts.

"Q. On the basis of these contracts, Mrs. Newton did not owe any part of the $5,000.00, did she?

"A. No, that was put in these for the purpose of identifying those contracts.

"Q. Take the Camp Campbell contract, if Mr. Newton was due to pay Mr. Edmonson $5,000.00 on account of Camp Campbell contract, wasn't he due to pay five other people a like amount?

"A. Oh, yes; as I said to you, I am trying to be fair to you and the Court, too. There were several names there. I have my opinion, but that is an opinion and not a fact." (B. R. 1214-1215).

(9) As of August 14, 1943, F. T. Newton made individual income tax return to the State of Mississippi for the calendar year of 1942, and in that statement he valued the Edmonson contract at $5,000.00, and deducted one-half of the contract, or $2500.00, as an authorized deduction (B. R. 1113). Mrs. Newton's return is of like effect (B. R. 971). These particular returns were sworn to as aforesaid, on August 14, 1943, and just eight days later, or on August 23, 1943, the Newtons were executing the deeds to the Edmonsons, and claiming a greater amount due, now said to be $104,000.00. This testimony is, of course, unworthy of belief.

Fraud Chargeable to Mrs. Edmonson Alone Precludes Her Prevailing

We adopt the several affirmative positions taken by us in response to original petition for certiorari, and in addition thereto, add that every known badge of fraud came into existence in connection with the attempt to pass title to the property involved. The statutory and common law of Mississippi, here controlling, make this conclusion mandatory. In the first place, Mrs. Edmonson neither pleaded

nor proved that which was required of her under Section 67 (d) (6) of the Bankruptcy Act.

> "The burden was on the appellant, if it would save the transaction under said Section 67 (e), to prove that it was a purchaser in good faith and for a present fair consideration. . . . Appellant has failed to meet this burden." *Edward Hines Western Pine Co. v. First National Bank,* 61 Fed. 2d 503, (CCA Ill.).

The presumption is against petitioner, since there are involved members of her family.

> "The decision of this court in the Prosser case above cited is peculiarly applicable, in that in involved, as here, transactions between an insolvent debtor and members of his family, which are presumptively fraudulent, and call for full explanation on the part of the beneficiaries." *Bailey v. Blackmon,* (C.C.A. 4th), 3 Fed. 2d 252.

Where fraud is shown on part of grantor, burden shifts to grantee to show good faith and valuable consideration. The Newtons have been adjudged bankrupts on basis of their having fraudulently conveyed away this very property.

> "A debtor being unable to pay a debt when called upon by the creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyances of property is considered fraudulent and void, and it is incumbent on the party holding such property, and insisting upon such claim to show that such debtor, at the time of conveyance, retained other specific property, readily accessible, and ample for the discharge of all his debts, and this burden has not been met in this case." *Ames* v. *Dorroh,* 76 Miss. 187. See also *Richards* v. *Vaccaro,* 67 Miss. 516, 7 So. 516.

On question of debts and obligations and the time which must control as to when the Newtons became obligated to

the surety companies and banks and others having most of the claims, the case of *Ames* v. *Dorroh, supra,* settles the rule in Mississippi in favor of position that the ultimate result of the several contracts reaches back to the time when the contracts were made, and this means that subsequently accruing debts on contracts with surety companies and banks must be included:

> "It is a settled rule of law that the surety on a guardian, administration, or other fiducial obligation, is, in contemplation of the statute of frauds, a creditor of the principal in such bond from the date of its execution, though no default occurs until long afterwards. The liability, whenever happening, relates back to the date of the contract; and so it must be in this case, that C. B. Ames was a creditor of R. C. Patty for all sums of money subsequently paid by complainants for defaults of said Patty occurring after December 24, 1863, and before the first Monday of January, 1888."

Existing badges of fraud preclude recovery of property by Mrs. Edmonson.

> "On the issue as to whether there was a bona fide sale from Jos. V. Lavecchia to his sister-in-law, the following well-known labels and badges of fraud are disclosed by the evidence: Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempt to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a loss of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property." *Reed* v. *Lavecchia, et al.,* 193 So. 439, 187 Miss. 413.

The consideration was incorrectly identified. The deeds show consideration of ten dollars. The amount of debts

assumed, as identified in the deeds, is $33,230.00, and not $84,000.00. The revenue stamps would indicate a total consideration of $29,000.00.

> ". . . In the case of Magic City Coal & Feed Company *v.* Lewis, 164 Ky. 454, 175 S. W. 992, 993, we said: 'Fictitiousness of consideration and false statements and recitals as to consideration of a conveyance . . . 'The insolvency or considerable indebtedness of the grantor is a badge of fraud.' " *Howard et al.*, v. *First National Bank*, 110 S. W. 2d, 293, 296. See also *Reed* v. *Lavecchia, supra.*

This was an unusual transaction.

a. The Newtons were in a rush to get rid of the property.

b. The Edmonsons never saw the property and did not know of its location.

c. The Edmonsons did not know the value of any particular piece of property.

d. The Newtons retained office space and retained rents to October 15, and the United States District Judge found as a fact that the Newtons continued to collect rents after the deeds were delivered.

e. The deeds were kept in Newton's safe until date of recordation on October 6, 1943.

f. Two deeds were executed by Newton instead of one covering the same property.

g. All of the real property of the Newtons was conveyed to the sister of Mrs. Newton.

Badges of Fraud

a. These deeds were dated August 23, and were not recorded until October 6, 1943. See *Davis* v. *Cassels, et al.*, 220 Fed. 958 (Ala.), condemning this conduct.

b. The Newtons and Edmonsons were in undue haste, after obtaining the audit on or after August 15th, to obtain

deeds by August 23, 1943, if the deeds were then obtained. This secrecy and haste is a badge of fraud. Paragraph 86, 37 C. J. S. 926.

c. Insolvency or substantial indebtedness of grantor and conveyance of substantial of property, as was here done, is indication of fraud. *Michel* v. *American Fire & Casualty Co.* (C. C. A. 5th Cir.) 82 F. (2d) 583.

d. The conveyance here involved was a transfer of all real property other than the homestead of the Newtons, and for insolvent grantors this is a badge of fraud and is condemned by law. Paragraph 89, 37 C. J. S., 927.

e. Failure of the Edmonsons to produce evidence on the trial to support the conveyances is proof of fraud.

> "The presumption is that if they could have truthfully testified to facts showing the bona fides of the conveyance they would have done so." Paragraph 91, 37 C. J. S., 928. See also *Jones* v. *Jones*, 71 S. W. (2d) 999, 1004 (Ky.).

f. The Edmonsons failed to examine the property identified in the deeds and failed to take inventory of goods bought, and this is a badge of fraud. See *Varn Inv. Co.* v. *Bankers Trust Co.*, 141 S. E. 900 (Ga.), and *Chamberlain* v. *Dorrance*, 69 Ala. 40.

g. Mrs. F. T. Newton and Mrs. John B. Edmonson are sisters, and the presumption is in favor of creditors that conveyance by insolvent grantor is fraudulent.

> "The burden of overcoming this presumption is on the party claiming under the conveyance, contract, or gift." *Ham* v. *Ham*, 110 So. 583, 146 Miss. 161. See also *Bourn* v. *Bourn*, 140 So. 518, 163 Miss. 71, and *Watkins* v. *Martin*, 147 So. 652, 167 Miss. 343.

h. All of the transactions between the Newtons and Edmonsons before and after the delivery of the deeds were

void of any kind of writings or records, and all monies were handled in cash.

i. The grantors retained benefits to themselves after the execution and delivery of the deeds. The district judge found as a fact that the grantors continued to collect rents and retain same until the default of the Newtons on October 16, 1943 (R. R. 932). Under such cases where the grantors are under failing circumstances, no court will permit the conveyance to stand. The Supreme Court of the United States has followed the Supreme Court of Mississippi on this subject.

> "The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed, without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit. Wooten *v.* Clark, 23 Miss. 75; Arthur *v.* Com & R. R. Bk., 9 Sm. & M. 394; Towle *v.* Hoit, 14 N. H., 61; Paul *v.* Crooker, 8 N. H. 288; Smith *v.* Lowell, 6 N. H., 67. Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belong to his creditors." *Lukins* v. *Aird*, 18 Law Ed., 750. See also *Dent* v. *Ferguson*, 33 Law Ed., 242, and *Benedict* v. *Ratner*, 69 Law Ed., 991.

There are many other badges of fraud, including inadequacy of consideration, false statements made respecting ownership of property, no evidence of acquittance of any debt, conflicts of statements of material facts by the several parties, alterations appearing in the deeds as to dates,

failure of the grantee to pay taxes on the property, the placing of other valuable property beyond the reach of creditors, including the bond transaction, which placed the Government Bonds of the Newtons in the hands of Newton's father and brother, failure to notify tenants of the alleged change of ownership, failure to notify insurance agents of the change in ownership until November 1, 1943, and the fact that the Newtons and Edmonsons are constantly together in and out of court.

Conclusion

In view of all of the above, the amended petition for writ of certiorari should be denied. The Circuit Court of Appeals for the Fifth Circuit has committed no error. It could not have reached any other conclusion than the one reached, and its judgment should not be further inquired into.

Respectfully submitted,

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Of Counsel for Creditors of Bankrupts.

Certificate

The undersigned, of attorneys for G. M. McWilliams, Trustee in Bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts, and respondent in Cause Number 287 in this Court, and here involved, hereby certifies that he has mailed to the Honorable Horace C. Wilkinson, of Birmingham, Alabama, postage prepaid, a copy of the foregoing response and brief, and that he has delivered to the Honorable T. J. Wills, attorney for petitioner, a copy of same, on this 20th day of November, A. D., 1947.

M. M. ROBERTS,
Of Attorneys for said Trustee in Bankruptcy,
Hattiesburg, Mississippi.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS,

Respondent

BRIEF OF MARYLAND CASUALTY COMPANY AND NATIONAL SURETY CORPORATION, SURETIES, IN OPPOSITION TO AMENDED PETITION FOR CERTIORARI.

WILLIAM H. WATKINS,
Amicus Curiae,
Attorney for Maryland Casualty Company and National Surety Corporation, Surety Creditors of Mr. and Mrs. F. T. Newton

P. H. EAGER, JR.,
THOMAS H. WATKINS,
MRS. ELIZABETH HULEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY

APPLICATION OF NATIONAL SURETY CORPORATION AND MARYLAND CASUALTY COMPANY TO FILE BRIEF IN OPPOSITION TO ORIGINAL AND AMENDED APPLICATION FOR CERTIORARI IN THE ABOVE CASE.

Come the Maryland Casualty Company and the National Surety Corporation, by their Attorneys, and show unto the Court that they, and each of them, are creditors of Mr. and Mrs. F. T. Newton, Bankrupts by reason of the fact that they, and each of them, became and were sureties on the contract bonds of said bankrupts and paid large sums to persons furnishing labor and materials to said bankrupts; that the claims on behalf of each of them have been duly filed with the Referee in Bankruptcy for the Southern Dis-

trict of Mississippi and have been approved; that they are, therefore, interested in the outcome of the application for certiorari herein, and they represent to the Court that a brief filed by their counsel would be helpful in determining the questions involved.

WHEREFORE, they move the Court that they be permitted to file this motion and brief thereto attached, in opposition to application for certiorari.

Respectfully submitted,

WILLIAM H. WATKINS,
Attorney for Maryland Casualty Company and National Surety Corporation, Sureties.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts,

Respondent

BRIEF OF MARYLAND CASUALTY COMPANY AND NATIONAL SURETY CORPORATION, SURETIES, IN OPPOSITION TO AMENDED PETITION FOR CERTIORARI.

Statement

The record in this case before the Court on application for certiorari consists of five printed volumes of testimony, three volumes of which are numbered 11,306, United States Circuit Court of Appeals, Fifth Circuit, and two volumes of which are numbered 11,905, before the same court. The case was heard before the United States Circuit Court of Appeals, not only on the five printed volumes in question, but on unprinted portions of the record from the United

States District Court for the Southern District of Mississippi, which are not before the Court.[1]

Prior to April 1, 1943, a partnership composed of F. S. Glenn, F. T. Newton and Mrs. Ethel Flurry Newton (Mrs. F. T. Newton), in Hattiesburg, Mississippi, were engaged in a general contracting business (R. 892-896), and upon the date mentioned had some twenty-odd contracts with the United States Government for constructing war projects. The partnership furnished its creditors a statement of partnership property showing real estate of the value of $451,000.00, which statement was used as a basis for credit. Upon the date aforesaid, the partnership was dissolved and a new partnership organized, composed of Mr. and Mrs. F. T. Newton, which partnership assumed all of the obligations of Newton & Glenn, which partnership had under construction a number of Government projects. As of April 1, 1943, the new partnership issued a financial statement (R. 326-330) which showed as partnership assets real estate, at Hattiesburg, Mississippi, of the value of $451,000.00. The Maryland Casualty Company and National Surety Corporation became sureties on contract bonds of Newton & Glenn, and, likewise, upon bonds covering contracts taken by F. T. Newton, a partnership, composed of himself and Mrs. Newton. By reason thereof, they became, and still are, largely indebted to the sureties. Mrs. F. T. Newton was not only a member of the partnership composed of herself and her husband, but, individually, executed an indemnity agreement whereby she agreed to protect each of them against any kind of loss, injury or damage by reason of the execution of bonds for Newton & Glenn or F. T. Newton. Upon the 6th day of October, 1943, there

[1] In this brief, when referring to the pages of the record, in Cause No. 11,306, we use (R), and in referring to the pages of the record, in Cause No. 11,905, we use (R. 2).

were filed in the Office of the Clerk of the Chancery Court in Hattiesburg, Forrest County, Mississippi, three deeds of conveyance to Mrs. John B. Edmonson, the petitioner in this case, a sister of Mrs. F. T. Newton; one from F. T. Newton to Mrs. John B. Edmonson (R2 102), in which deed the property was not specifically described except by Exhibit "A" to the deed. The second deed was from F. T. Newton to Mrs. John B. Edmonson (R2 115), in which the property was specifically described. The third deed was from Mrs. Ethel Flurry Newton (Mrs. F. T. Newton) to Mrs. John B. Edmonson (R2 126). In addition, there was conveyed to Mrs. Edmonson a promissory note of Tommy B. Sims held by Mr. and Mrs. Newton, in the sum of $2,500.00, which comprised all of the real estate owned by either of them other than the homestead in which they resided. The sureties exhibited the original and amended bills of complaint in the District Court of the United States for the Southern District of Mississippi for the purpose of setting aside the conveyances aforesaid as being without consideration, fraudulent and void. The purpose thereof was to subject the property described in said conveyances to the indebtedness due the plaintiffs (R2 5-17). A petition for involuntary bankruptcy, as well as amended and supplemental petition, was filed against Mr. and Mrs. F. T. Newton by certain of their creditors asking that they be adjudged bankrupts, among other reasons, for the alleged fraudulent conveyances of the property herein involved to Mrs. John B. Edmonson, a sister of Mrs. F. T. Newton. The case was heard before a jury and a verdict rendered by the jury declining to adjudge them as bankrupts. A motion by the petitioning creditors was made for a new trial accompanied by a motion for judgment notwithstanding the verdict. The District Judge sustained the motion for petitioning creditors (R. 1655), wherein in a long opinion (R. 1657) he held that the

conveyances from the Newtons to Mrs. Edmonson were made to hinder and delay creditors in the collection of their debts. The Court used the following language:

> "Under this set of facts a Court can reach no other conclusion that that these conveyances were made at least to hinder and delay creditors in the collection of their debts and the law thereupon presumes that they were fraudulent. It is true a lot of these transactions occurred after November 3, but nevertheless all of this evidence is admissible for the purpose of determining whether or not there was an intent to hinder, delay and defraud the creditors on October 6 when the deeds were filed for record. The testimony shows that the defendants are insolvent and owe debts far in excess of their assets as of November 3 and as of October 6 and as of December 6. The testimony of Newton himself is so vague and naturally so, not being a bookkeeper and accountant, that it is not entitled to much weight. He simply did not know and could not tell. While Dumain's audit was competent in evidence, yet it is so weak because of its nature that it cannot, by any stretch of the imagination, overcome the facts heretofore detailed. It was figured as of August 31, a date that is not material in the disposition of the cause, and throws very little light upon the solvency of the defendants.
>
> "The law is that if the conveyances were made with the intent to hinder, delay or defraud creditors that the burden of proof is upon the defendants to show solvency if they rely upon solvency. They have failed to do this. In addition, these conveyances both to the Edmonsons and to de Villentroy constituted preferences of these creditors over the other creditors, and from the whole testimony in this case this conclusion cannot be escaped."

The Court sustained the motion of petitioning creditors and directed a verdict adjudicating Mr. and Mrs. Newton bankrupts. While neither Mr. nor Mrs. Edmonson were

parties to this bankruptcy proceeding, there was a full, complete and exhaustive inquiry into the dealings between Mr. and Mrs. Newton and Mr. and Mrs. Edmonson. All of the parties, including Mr. and Mrs. Edmonson, testified in the case; accordingly, the defendants were adjudged bankrupts. An appeal was taken to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the District Court was affirmed, *Newton, et al.*, v. *Glenn, et al.*, 149 Fed. (2d) 879. In affirming the judgment, the Court used the following language, at Page 880:

> "It would be useless to review the evidence in the 1900-page record of the long jury trial. The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish *prima facie* all the acts of bankruptcy charged in the amended and supplemental petitions."

Certiorari was denied by this Court, No. 395, October Term, 1945, 326 U. S. 758, 66 S. Ct. 100, 90 L. Ed. 456.

Such further proceedings were had as that G. M. McWilliams, the respondent herein, was elected Trustee in Bankruptcy of the Estate of F. T. Newton, et al. He filed an amended complaint in the cause instituted by the sureties referred to, succeeded to all of the rights of the sureties therein asserted, as well as the rights conferred by law upon him as Trustee in Bankruptcy under the Federal Statute (R2 50), upon which complaint issue was taken by the petitioner (R2 64). At the trial of the case before the District Judge, the following facts appeared from the undisputed testimony:

Prior to March 31, 1943, a partnership known as Newton and Glenn, composed of F. S. Glenn, F. T. Newton, and his

wife, Mrs. F. T. Newton, carried on a general contracting business. They had under construction on the aforesaid date approximately twenty-five Government war contracts. Upon the date aforesaid, the partnership was dissolved; F. T. Newton and wife acquired the partnership assets, assumed the obligations thereof, and undertook to carry out said contracts, taking on approximately three new ones.

The enterprise was being financed through the Union Planters Bank of Memphis, Tennessee, hereinafter referred to as the Memphis Bank, though the loans were participated in by the First National Bank of Atlanta, Georgia, and the American National Bank of Nashville, Tennessee. The management of the loans, however, was in the hands of the Memphis Bank. The loans were secured by the personal endorsement of Mrs. F. T. Newton, and by the assignment of funds accruing from the United States Government on the projects in the course of construction.

On and prior to August 14, 1943, Newton was indebted to the Memphis Bank for approximately $1,500,000.00, and the officers of the Bank, not being entirely satisfied with the remittances they were receiving from the United States Government on the various projects, requested Newton to come to Memphis for a conference. This he did. He was optimistic and there was nothing to arouse the suspicion of the bankers.

Upon the 15th day of October, 1943, officers and attorneys of the three banks went to Hattiesburg. They went to Newton's office, at least, some of them did. Newton had represented to them that he owed only $140,000.00 to subcontractors. They found that he was owing to subcontractors approximately $650,000.00. In addition thereto, he wished the sum of $230,000.00 for the payment of the payroll at Brunswick, Georgia, which was to have been paid on or before October 16th. The conference lasted through

two days. It was stated that the employees at the Brunswick plant were threatening a riot, were milling about the plant, and the superintendent was afraid of physical violence. The representatives of the banks had the statement furnished by Newton both to the banks and the sureties as of March 31, 1943, from which it appeared that he and Mrs. Newton owned real estate in Hattiesburg, Mississippi, exclusive of furnishings, of the value of $451,100.00, producing monthly rentals of $5,734.50. Mr. Newton was very insistent that the banks let him have additional funds to meet his requirements. The banks intimated to him that, if he would give them a deed of trust on the real estate in Hattiesburg, Mississippi, included in his statement of March 31, 1943, they would take under consideration the question of advancing him sufficient funds to carry on. Without informing the bankers in the slightest manner that he had conveyed the property away, he took representatives of the banks, visited the property, and pointed it out to them as that property included in his statement. When asked if they could procure a deed of trust thereupon in order to secure any additional advances, he stated he would have to consult Mrs. Newton in respect thereto. Ostensibly for this purpose, he left the banks' representatives and returned in about two hours with a statement that Mrs. Newton was unwilling to execute a deed of trust on the property. He then insisted that it was the duty of the Bank to make the advances on the security already held. Quite extensive interviews were had with Mrs. Newton as well as with Mr. Newton, with no results.

Late in the afternoon of Saturday, October 16th, they became very suspicious and, with Mr. M. M. Roberts, attorney at law of Hattiesburg, Mississippi, went to the County Court House for the purpose of ascertaining what conveyances, if any, had been made of the property owned by Mr. and Mrs. Newton and referred to in the statement

of March 31, 1943. At the Court House, they found that no deeds had been indexed or recorded but, among the papers in the Courtroom, they found the deeds above referred to, which were marked "Filed October 6, 1943," with revenue stamps placed thereupon October 9, 1943, and they also noted the obvious erasures in the deeds which clearly showed that the instruments had been back-dated.

It was then proposed that a conference should be had in Atlanta, Georgia, between the interested banks upon the following Sunday, which would be the 24th day of October. Mr. Newton attended, with his attorney, Mr. Wills. They again requested Newton to give them security upon the real estate shown in the statement. Neither Mr. Newton nor Mr. Wills made any statement to the effect that the property had been conveyed away. (Williams—R. 338). (Wills—R. 1157). (Moise—R. 1679). (Berry—R. 1725). (House—R. 1747). (Alexander—R. 1789). (Wilson—R. 1792). (Bond—R. 1825). (Wilson—R. 2790).

The evidence undisputedly established, and the District Judge so found, that Mr. and Mrs. Newton not only conveyed to Mrs. Newton's sister every particle of real estate which they owned other than their home, but had disposed of and concealed every portion of their remaining property so that there was absolutely nothing whatever for creditors, and they were utterly bankrupt.

The District Judge found that the conveyances to Mrs. Edmonson were fraudulent insofar as the grantors were concerned; that they intended to place the property beyond the reach of their creditors.

The Court held, however, that Mrs. Edmonson, the grantee, did not participate therein, and was an innocent purchaser thereof, and that she was entitled to hold the property until she received the sum of $104,000.00, being the alleged indebtedness owing by F. T. Newton to Mrs. Edmonson.

Findings and decree of the District Judge, dated August 28, 1946 (R2—920), as well as supplemental finding of fact (R2—931), wherein the District Judge held that Mr. and Mrs. F. T. Newton, the grantors, retained benefits flowing from the property conveyed until October 16, 1943.

The Court found that the property conveyed was of value of $450,000.00, and that the consideration paid by Mrs. Edmonson was inadequate but was without fraudulent intent (R2—932).

The petitioner, Mrs. Edmonson, took no appeal from this decree. However, the respondent trustee appealed therefrom to the United States Circuit Court of Appeals, Fifth Circuit, in which court the decree of the District Judge was reversed and remanded with directions that the deed be cancelled. The case is officially reported, *McWilliams* v. *Edmonson,* Fifth Circuit, 162 Fed. (2d) 454.

ARGUMENT

Point I

The findings of fact and conclusions of law of the District Judge were unreasonable and the United States Circuit Court of Appeals, Fifth Circuit, correctly so held and reversed the decree appealed from.

The Circuit Court of Appeals, in passing on a question of this kind, is not merely exercising the right of review. It does not sit as a mere Court of error. The case has a new hearing. The Court must examine the record and try the case *de novo.*

In the case of *Edwards* v. *Lain,* 7 Cir., 112 Fed. (2d) 343, the Court used the following language, at page 347:

> "The true rule in this respect is set forth in Keller v. Potomac Company, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: ' * * * In that procedure (in

> equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witness.' "

The appellant, G. M. McWilliams, Trustee in Bankrupt in this case, is entitled to take advantage of the provisions of the Bankruptcy Act, as well as the State statutes of the State of Mississippi, and the common law thereof dealing with the subject.

U. S. C. A., Title 11, Section 110, Paragraph e, contains the following language:

> "(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.
>
> "(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

Section 1327, Mississippi 1942 Code, provides that creditors may attack fraudulent conveyances. A copy of said section is attached and made *Appendix I* hereto.

Section 265, Mississippi 1942 Code, is to the same effect, a copy of which section is hereto attached as *Appendix II.*

If the purpose of the grantor be to place the property beyond the reach of his creditors, the statute applies, regardless of the solvency of the grantor. *Citizens Bank* v. *Budding,* 65 Miss. 284, 4 So. 94.

Point II

A voluntary conveyance without consideration is void as to creditors and may be set aside under the statute.

Under the Mississippi law, a voluntary conveyance without consideration is void as to the creditors of the grantor. *Swayze* v. *McCrossin,* 13 Smedes & M. 317; *Thomason* v. *Neely,* 50 Miss. 310; *Shaw* v. *Millsaps,* 50 Miss. 380; *Holmon* v. *Hudson,* 188 Miss. 87, 193 So. 628.

Not only is this true, but even where a valuable consideration was present, a conveyance is void and fraudulent if the same was merely a device intended to hinder, delay or defraud creditors. *Buckingham et al.* v. *Wesson, Administrator, et al.,* 54 Miss. 526; *Brister* v. *Moore,* 16 So. 596; *Pope* v. *Pope,* 40 Miss. 516. The case does not turn upon the solvency of Mr. and Mrs. Newton upon any particular date. However, the fact that Mr. and Mrs. Newton were insolvent upon the date of the execution of the deeds to Mrs. Edmonson was settled in the bankruptcy proceedings, to which reference has been made.

Point III

The presence of fraud is determined by what is known as "Badges of Fraud."

In the case of *Humbird* v. *Arnett,* Mont., 44 Pac. (2d) 756, the following rule is announced:

> "The following are some of the badges of fraud generally recognized by the authorities: A fictitious con-

sideration for a conveyance (27 C. J. 484; Moore on Fraudulent Conveyances, 229); false statements made of the consideration for a conveyance or mortgage (27 C. J. 485; Moore, supra, 225); a transfer made in anticipation of a suit to be commenced (27 C. J. 488; Moore, supra, 238); an excessive effort to give the transaction the appearance of fairness and regularity and to conceal its real nature (27 C. J. 493; Moore, supra, 246); the retention of the possession of the property transferred after conveyance as before (27 C. J. 494; Moore, supra, 247); and the reservation of a trust to the use of the same person after the conveyance as before (27 C. J. 495; Moore, supra, 248)."

See C. J. S., Vol. 37, page 922, where the rule is very clearly announced.

In the case of *Toone* v. *Walker,* (Okl.), 243 P. 147, the court used the following language:

"In the case of Brooks *v.* Garner, 20 Okl. 236, 94 P. 694, 97 P. 995, this court held, where the question of good faith is involved, the party asserting the fraud is driven to the necessity of establishing it by circumstantial evidence and by proving the acts, known in law as badges of fraud, and adopts the definition given by Wait on 'Fraudulent Conveyances', sec. 225, that—

" 'Badges of fraud are suspicious circumstances that overhang a transaction, or appear on the face of the papers. The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalog them. A single one may stamp the transaction as fraudulent, and, when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud.' "

In the case of *Reed* v. *Lavecchia,* 193 So. 439, 187 Miss. 413, there was presented a suit to set aside a conveyance made by one Lavecchia to his sister-in-law. The Chancellor held that the conveyance was free from fraud and dismissed

the bill. The Supreme Court reversed the case and entered a decree for the complaining creditor, assigning as its reason the numerous badges of fraud presented in the case. The court used the following language:

> "On the issue as to whether there was a bona fide sale from Jos. V. Lavecchia to his sister-in-law the following well-known labels and badges of fraud are disclosed by the evidence: Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempting to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a list of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property."

In support of which we submit to the Court as follows:

We call the attention of the court to the fact that the District Judge found as a matter of fact and law that the grantors in the respective deeds, Mr. and Mrs. F. T. Newton, were guilty of actual fraud. Certainly, very important legal consequences affecting the rights of the grantee, Mrs. Edmonson, flow therefrom. The fraud of Mr. and Mrs. Newton having been established, such fraud of the grantors is attributed to the grantee and it becomes the duty of the grantee, Mrs. Edmonson, clearly to establish her good faith and freedom from fraud.

See the case of *Richards* v. *Vaccaro & Co.*, 67 Miss. 516.

See also Am. Jur. Vol. 24, Section 20, Page 176.

Mrs. Edmonson, however, not only has the duty of exculpating herself from the presumption of bad faith arising out of the fraud of the grantors in the deed but the fiduciary relation existing between the grantors and the grantee in

that Mrs. Edmonson was a sister of Mrs. Newton; lived about five miles apart; visited frequently; were very intimate friends. During the spring and summer of 1943 Mrs. Edmonson worked a few months in Mrs. Newton's office; drew a salary of $150.00 a month doing general office work, filing, keeping books. Mrs. Edmonson (R. 434-435) (R. (2) 194).

Mr. Edmonson testified that the Newtons and the Edmonsons were very friendly; that Mrs. Newton had access to anything that the Edmonsons had (R. (2) 465).

If the Newtons had the purpose to convey this valuable property so that the same could not be reached by the creditors and at the same time belonged to them, they selected the most natural route, a conveyance to Mrs. Newton's sister.

In the case of *Ham* v. *Ham*, 110 So. 583, 146 Miss. 161, the Court held that a fiduciary relation existed between brothers and a presumption of fraud and bad faith arose therefrom shifting the burden of proof of good faith to the grantee. The Court used the following language:

> "When such a relation exists, and the parties thereto —'consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance or contract or gift, * * * the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid, but a presumption of its invalidity arises which can only be overcome, if at all by clear evidence of good faith, of full knowledge, and of independent consent and action.' 2 Pomeroy Equity Jurisprudence (4th Ed.), Section 957.
>
> "The burden of overcoming this presumption is on the party claiming under the conveyance, contract, or gift. Meek v. Perry, 36 Miss. 190; Hitt v. Terry, 92 Miss. 710, 46 So. 829."

The same rule was announced in *Bourn* v. *Bourn*, 140 So. 518, 163 Miss. 71; *Watkins* v. *Martin*, 147 So. 656, 167 Miss. 343; *Hitt* v. *Terry*, 92 Miss. 710, 46 So. 829; *Norfleet* v. *Beall*, 82 Miss. 538, 34 So. 328; *Meek* v. *Perry*, 36 Miss. 190; *Plant* v. *Plant*, 76 Miss. 590.

Therefore, in view of the fact that the District Judge convicted the grantors, Mr. and Mrs. F. T. Newton, of actual fraud in making the conveyances complained of and the grantees sustained a fiduciary relation to the grantors, it became their duty by clear and convincing testimony to show the bona fide nature of the transaction.

(a) The testimony of Mr. and Mrs. Edmonson is evasive, contradictory, lacking in frankness, and condemns the entire transaction.

It will be conceded that by reason of the fact that the grantors in the deeds were guilty of actual fraud and had the purpose of placing the property beyond the reach of their creditors, and due to the further fact that a fiduciary relation existed between Mrs. Newton and Mrs. Edmonson, a very high duty was cast upon Mrs. Edmonson to show by clear and convincing testimony that the conveyances were made by the Newtons and accepted by her in good faith, without any notice of the purpose of the Newtons to defraud their creditors, and that she was a bona fide purchaser thereof without participating in the fraud of the Newtons whatsoever. In order to hear this burden it was necessary that Mr. and Mrs. Edmonson produce independent and disinterested testimony in respect to the bona-fide of the transaction which was not done. It was certainly incumbent upon them to be frank with the Court and to give a clear and consistent and trustworthy account of the transaction. Upon the other hand, the testimony of Mr. and Mrs. Edmonson is evasive, contradictory and lacking in frankness. Mrs.

Edmonson testified that she had placed no value upon the separate pieces of property conveyed to her (R. (2) 449); that they purchased the property for just exactly the amount of the indebtedness. There was no bargaining in respect to the property or any piece thereof (R. (2) 207-208). The rent was collected by Mrs. Brannon. Mrs. Edmonson had no idea as to the amount of rents Mrs. Brannon had paid her (R. (2) 450); was not familiar with the rent upon a single piece of property; has the money but never put it in the bank (R. (2) 453). She testified that she did not know that two deeds were executed covering the property; says she started to collecting the rents the 1st day of September, 1943 (R. (2) 799). She testified that Mr. Newton approached them about making the sale of the property (R. (2) 804); says she did not know what revenue stamps were placed on the deeds or whether they were sufficient or not (R. (2) 447); says she was entitled to the rents from October 1st (R. (2) 450). She did not know who put revenue stamps on the deeds; she testified the deeds were made out in duplicate but she did not know why. She was asked why she did not get rents from the date of the deed; she said because it was not placed of record (R. (2) 209). She had no idea how much rent she received and put no part of it in the bank; was unable to state the purchase price of a single piece of the property (R. (2) 210-211); was not familiar with the rent upon a single piece of the property. She testified that Mr. and Mrs. Newton offered to let them have the property for the debt.

At (R. (2) 848), she testified as follows:

> "Q. So, you really don't know what was included in that transaction?
>
> 'A. Well, you see, I had that such a little while, until I didn't get familiar with it, and I didn't work up at the office all the time."

From her testimony (R. (2) 848 and 849), it is apparent that she had no idea what went into the deed; she knew absolutely nothing about the property she was buying.

The petitioner, Mrs. Edmonson, in her testimony, admitted that they cleaned the Newtons out (R2 861-862). She testified as follows (R2 861-862):

"Q. There wasn't anything else you could get but this real property?

"A. Not right then.

"Q. So, you took what was before you, what was available, and you could get?

"A. That's right.

"Q. And they didn't have anything else that you knew of? That was all you knew of they had?

"A. So far as I know that was all the real estate they had, but I don't know all about their business.

"Q. You don't know of any other property they had, real or otherwise?

"A. No, sir.

"Q. Whenever you took this property, you took all they had?

"A. We took all they offered us.

"Q. You took all the property that they *had* of any kind?

A. I think it was.

"Q. Fact of the business, that was your best judgment when you got that deed, you thought you were getting all they had?

"A. Yes, sir."

She gave no notice of any kind to the tenants that she had purchased the property (R. 871-872). She only went to the office two or three times after the deeds were executed (R. (2) 878-879). She gave a very unsatisfactory explanation as to how much rent she collected and what she had done with it (R. (2) 879-883). After considerable questioning, however, she stated that she put the money in a lock box. She consented that the lock box might be frozen by the

bank and the trustee might examine it (R. (2) 883-889). Before anyone had access to the box, the trustee examined it and found it absolutely empty (R. (2) 896).

Mr. Edmonson testified that he did not talk to the Newtons before he got the deeds (R. (2) 459); that he went to Newton's office and Mr. Newton suggested that they take the property; that he went in and examined one piece of property which was an apartment house on Hardy Street before closing the transaction (R. (2) 460); that he merely looked at the property from the outside while driving by (R. (2) 461). He had no idea whatever as to the value of the furnishings in the house; did not place any value whatsoever upon the personal property; got the entire property as a whole, for a lump sum, including the Sims property; that it was assigned upon September 22, 1943 (R. 463-464).

Testimony of this character, instead of tending to bear the burden of proof incumbent upon Mr. and Mrs. Edmonson, characterized the same as part of the device and scheme of Mr. and Mrs. Newton to place their property beyond the reach of their creditors. That this was successfully done will more fully hereinafter appear.

(b) The conveyances were without consideration and, therefore, fraudulent and void.

The only consideration contended for the conveyances of the property in question by Mr. and Mrs. Newton were certain alleged partnership agreements between Newton and Glenn and Mr. and Mrs. J. B. Edmonson, referred to in the finding of fact and conclusion of law of the District Judge in the following language:

> "After the purchase by Newton of the interest of Glenn, Newton procured nineteen of the contracts, totaling the twenty-six. After Newton and Glenn procured the Camp Campbell contract and the Rohwer,

Arkansas contract and the Greenville, Mississippi contract, Newton entered into a sub-contract with John B. Edmonson and Mrs. John B. Edmonson as to his two-thirds interest in each of these contracts (by the terms of which the Edmonsons were to share in the Camp Campbell contract one-seventh of the profits or losses in Newton's two-thirds interest therein, and a like agreement as to the Greenville contract and to share one-third of the profits or losses of Newton's two-thirds interest in the Rohwer, Arkansas job)." (R. (2) 922).

Under these three contracts, Mr. and Mrs. Edmonson were to have one-seventh of Newton's two-thirds interest in the enterprises, sharing in profits to the same extent as well as the losses, and it was claimed that, upon the 15th day of August, 1943—immediately following Newton's conference with the bankers in Memphis wherein he doubtless anticipated the probability that the bankers would not go forward with him, since he knew his condition better than they did, and he knew that, instead of owing $140,000.00 to subcontractors, he owed $650,000.00, and he knew he had to have $230,000.00 on his payroll at Brunswick—according to their testimony, R. G. Wooten, an auditor, purported to make out the profit payable to Mr. and Mrs. Edmonson under said three contracts, and figured that there was $52,000.00 due each one of them. It is claimed that the deeds of conveyance here involved were executed in settlement of the said $104,000.00.

The property conveyed was of very great value. Newton, in his statement of March 31, 1943, stated that the property was valued at $451,000.00, exclusive of furnishings, and rented for $5,734.50 per month (R. 358-359). Newton testified (R. 405) that the property was worth $451,000.00, and again testified to the same effect (R. 651). Mrs. Newton testified that the property had a value of $451,000.00 (R. 716).

Mr. Paul Mote, who audited the books of Newton following his default, audited the income from the Receivership of the properties for twenty-three months. The net income for the twenty-three months, that is to say the income after the payment of taxes, insurance, and repairs, was $85,-487.24. The net income for one month was $3,716.87, and the net income for one year, $44,602.44. Exclusive of the Receiver's compensation, the property as operated by the Receiver would have yielded 6% income on a valuation of $743,374.00, 8% income on a valuation of $557,530.00, and 10% income on a valuation of $446,024.40 (R2 — 832). The District Judge, in his finding, fixed the value of the property on the date of the conveyances at $450,000.00.

The only property which Mrs. Edmonson owned was a one-half interest in 200 acres of country property in Jackson County, Mississippi, and property assessed at Hattiesburg, Mississippi, at $1,000.00. Mrs. Edmonson testified that she contributed nothing to the capital, rendered no services of any kind; that she had nothing to do with the making of the contracts whatsoever (R. 440-443). She testified that the mortgages on the property were being paid off and the property carried out of the rents (R. 450-451).

It will be noted that Mrs. Newton was not a party to the contracts of partnership, and was not obligated to pay Mrs. Edmonson anything. It will be further noted that the greater portion and most valuable portion of the property conveyed belonged to Mrs. F. T. Newton. She owed neither her sister nor Mrs. Edmonson any sum whatsoever. Not a dollar was paid by either Mr. or Mrs. Edmonson as consideration for the conveyances; no property of any kind conveyed therefor. This valuable property worth $450,-000.00, plus furnishings of $30,000.00 to $50,000.00, renting for approximately $5,000.00 per month, was conveyed to Mrs. Edmonson, the sister of Mrs. Newton, by reason of the alleged contract. We submit, if the Court please, that the

conveyances were nothing more than a gift from Mr. and Mrs. Newton to Mrs. Edmonson. It is perfectly clear from this record that the entire consideration was simulated, and had no basis as a matter of fact. The District Judge, in his conclusion, found that Mrs. Edmonson contributed nothing to any of the contracts, never went to either one of them except upon a short visit with her husband, didn't even know what they were all about, and yet the District Judge justified the conveyance of this valuable property to her upon this simulated consideration.

In respect of which we submit that the agreements were not partnerships at all under Mississippi law. They were lacking in every essential element necessary to the formation of a partnership under Mississippi law.

In the case of *Cudahy Packing Co.* v. *Hibou,* 46 So. 73, 92 Miss. 234, 18 L. R. A. (N. S.) 975, the Supreme Court of Mississippi held that the essentials of a partnership were (1) community of interest in the partnership property; (2) joint ownership in the business; (3) each member of the partnership should be an agent therefor with right of participation in the management.

Other Mississippi cases are *Lipscomb* v. *State,* 114 So. 754, 148 Miss. 410; *Baker* v. *Connecticut General Life Ins. Co.,* 18 So. (2) 438, 196 Miss. 701.

It is held in the foregoing cases that mere participation in profits is insufficient to constitute a partnership. This rule is announced 47 C. J. 669-670. The partnership instruments involved were carefully drawn so as to exclude Mr. and Mrs. Edmonson in the proprietorship, ownership or control of said operations.

The agreement contains the following language (R. 218):

> "It is further understood and agreed by all of the parties hereto that the said F. T. Newton is to conduct and manage the construction and carrying out of said contract in accordance with his own judgment of the

same and that the said F. T. Newton shall have full power to control said construction in every particular and it is hereby agreed that the power of attorney for and on the part of each of the above six parties is hereby vested in the said F. T. Newton to execute full determination and control of said construction provided for in said contract."

The United States Circuit Court of Appeals places emphasis upon the total exclusion of the members of the alleged partnership from any participation therein whatsoever. The transaction is fraudulent on its face. These contracts were what is known as family partnerships, made for the purpose of avoiding income tax. Your Honors will take judicial notice that of recent years there has grown up a custom among some business enterprises to make what is known as family contracts. These contracts are not made with the idea that members of the family will take any part in the management or make any contribution to the capital, but purely for the purpose of defrauding the United States Government and State authorities out of taxes.

In determining this question the Courts hold that the facts of each case must be determined in the light of the proof, but the Courts are unanimous in holding that if the contract is made for the purpose of diminishing income tax and for no other purpose, then the arrangement is fraudulent and void. The leading case upon the question is that of *Commissioner of Internal Revenue* v. *Frances E. Tower,* 327 U. S. 280, 90 L. Ed. 670. That case involved a partnership agreement between husband and wife, and the Court held that since there was a showing that the arrangement was made for the express purpose of reducing taxes simply, that the agreement was ineffective.

The District Judge made a finding of fact that these

partnership agreements were made for the purpose of diminishing income tax. The Court used the following language:

> "These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted, and at that time there was no thought in the minds of any of the parties of delaying or hindering any creditor in the payment of his claims." (R. (2) 925).

It must be borne in mind that in the bankruptcy proceedings the United States Government has proved the claim of unpaid taxes against the bankrupt of some $250,000.00. If the arrangement may not be used to defraud the United States Government of taxes, neither may it be resorted to as a device to defraud the creditors of Mr. and Mrs. Newton. Mr. Newton was familiar with transactions of this character. He testifies that he treated his wife, Mrs. Newton, as a partner in Newton and Glenn in 1942 purely for income tax purposes (R. 661-664). Mr. Glenn testified undisputedly that the contracts with Mr. and Mrs. Edmonson were purely for taxation purposes, and that he had such understanding with Mr. Newton (R. 775).

The writer of this brief does not mean to admit the correctness of the alleged audit whereby it is claimed that Mr. and Mrs. Edmonson had a share in the profits equal to $104,000.00. The correctness of this audit is involved in doubt, especially in view of the fact that it took place immediately after Mr. Newton's return from Memphis in August for a conference with his bank creditors, but whether the results of the audit are correct or not, the indebtedness was purely fictitious and may not support the conveyances complained of.

In the case of *Scherf* v. *Commissioner of Internal Reve-*

nue, Fifth Circuit, 161 Fed. (2d) 495, the Court used the following language:

> "Textbooks and decisions on tax law are strewn with the wrecks of abortive schemes of individuals to achieve the greatly desired end of dividing their income for tax purposes with persons who did not earn it."

Other cases are *A. L. Lusthaus* v. *Commissioner of Internal Revenue*, 327 U. S. 293, 90 L. Ed. 679; *Appel* v. *Smith, Collector of Internal Revenue*, Seventh Circuit, 161 Fed. (2d) 121; *Mauldin* v. *Commissioner of Internal Revenue*, Fourth Circuit, 155 Fed. (2d) 666, where the Court used the following language:

> "In summary, this case merely represents another in the stream of cases now coming before the courts wherein taxpayers have sought by various types of reallocation of income within the family group to retain the enjoyment of a large income without the normally incident tax consequences."

See the case of *Hash* v. *Commissioner*, Fourth Circuit, 152 Fed. (2d) 722.

Counsel cite the case of *Occidental Life Ins. Co.* v. *Eiler*, Eighth Circuit, 125 Fed. (2d) 229. The citation is erroneous. Counsel had in mind the case of *Hargrove* v. *American Central Ins. Co.*, Tenth Circuit, 125 Fed. (2d) 225, wherein the court announced the well established rule that the findings of the trial court are presumptively correct.

The rule is applicable to this case. The District Judge heard the witnesses testify and has made a special finding of fact that the arrangement was purely one to avoid the payment of income tax.

Counsel cite the case of *Butte & Superior Copper Company, Ltd.* v. *Clark-Montana Realty Company*, 249 U. S. 12, 63 L. Ed. 447, where the rule is announced that this Court must accept the concurrent conclusions of the two lower

courts on the facts unless clearly and manifestly wrong. We now invoke this rule. The District Judge held that the arrangement was purely for the purpose of avoiding income tax. The Circuit Court of Appeals concurs in that finding. The District Judge erroneously interpreted the law, however, in that respect, which the Circuit Court of Appeals corrected on its reversal, and we submit that the ruling of the latter court was in accordance with all of the authorities upon the question.

(c) *There are some special facts in respect to Mr. J. B. Edmonson to which the attention of the Court should be directed. These facts are not disputed.*

It is undisputed that Mr. Edmonson had been in the employ of Newton and Glenn prior to the making of the contracts, and subsequent to the making of the contracts, upon a salary basis of $75.00 per week, payable weekly. The duties performed by him were those of purchasing lumber for the partnership. Edmonson claimed, however, as did Mrs. Edmonson and Mr. and Mrs. Newton, that entering into the contracts in question was an inducement to close a lumber yard he had in Hattiesburg and that, therefore, he was entitled to the $52,000.00 in accordance with the terms of the contract. However, the evidence undisputedly shows that Newton transferred to Edmonson, about the time the storm hit, in excess of $40,000.00. Newton admitted (R. 707) that, about October 1, 1943, he paid Edmonson approximately $50,000.00. At (R2—523), Newton deposited to Edmonson's credit in the First National Bank of Hattiesburg $16,666.33, and again upon October 1, 1943, Newton transferred to Edmonson's account $14,421.84 (R2—524). Again, Newton admits that $8,000.00 went to Edmonson October 1, 1943 (R. 707). When this money was transferred to Edmonson, however, it was drawn out and went

underground and nobody has ever located it since. In addition to the foregoing, it was admitted of record R2—890) that Edmonson received a check for $5,000.00 dated October 2, 1943, a check for $5,000.00 dated October 5, 1943, and that Mrs. Edmonson received a check October 9, 1943, for $1,750.00, which makes a total of more than $50,000.00 received by the Edmonsons from the Newtons, which immediately went underground. It has made no track since and has never been heard from. Newton testified that he transferred the money to Edmonson to pay invoices for lumber; that he doesn't know, however, that the bills were ever paid. He further testified that Edmonson gave him the money back but could not remember when Edmonson did so. He testified that the money was turned over to Mrs. Newton who counted it; that he gave it all to his attorneys; said he saw Edmonson give Mrs. Newton part of it; that Mrs. Newton told him Edmonson gave the money back to her; that he didn't take the money to his attorneys in person but thought Mrs. Newton took it up to them (R2—344-347). He finally admitted, however, that he was mistaken in stating that Edmonson used the money to pay lumbermen whom Newton owed and whom he expected Edmonson to pay. Upon the other hand, he admitted that these lumbermen presented their claims for very large amounts against the sureties for labor and material furnished in the projects, and were paid by the sureties (R2—349).

Edmonson testified that he gave the money back to Newton (R2—468-469). He then testified that he thought he gave the money back to Mrs. Newton; that he didn't see it returned to Newton, didn't know that the money had ever been returned (R2—474). He introduced receipt purporting to be from Mr. and Mrs. F. T. Newton, signed by Mrs. Newton, for $31,000.00 (R2—419). This receipt, however, was signed by Mrs. Newton for Mr. Newton, and the Court

must bear in mind that the District Judge has convicted Mr. and Mrs. Newton of gross fraud in this case.

We called attention of the Court, however, to the fact that the money passed out of the bank to Edmonson and it has never made a track anywhere since that time. The Edmonsons had no enforceable contract by reason of the partnership agreement against Mr. F. T. Newton at the date of the execution and delivery of the deeds complained of, and the conveyances were pure gifts without consideration, from which it necessarily appears that the grantee, Mrs. Edmonson, held the title in trust for the grantors.

(d) Question of Revenue Stamps. It was the duty of the vendors under the Federal statutes to place revenue stamps upon the deeds in question based upon the consideration therefor.

Mr. and Mrs. Newton, as well as Mr. and Mrs. Edmonson, testified that the consideration for the execution of the instruments was the assumption of outstanding mortgages of $84,000.00 covering the properties in question, together with contract balances of $104,000.00. The record discloses that this statement is untrue. The property may have been subject to outstanding mortgages, but the grantee assumed a very limited portion thereof. As to the deed (R2—102), the grantee, Mrs. Edmonson, assumed (R2—104), the indebtedness of $12,500.00 to the Standard Life Insurance Company and at (R2—113) an indebtedness of $16,000.00 to the Standard Life Insurance Company, of Jackson, Mississippi, making a total of $28,400.00 assumed, and there were placed revenue stamps thereon (R2—114) of $11.00 which represented revenue stamps on $28,000.00 indebtedness assumed.

As to the deed (R2—115), we find the same assumption of mortgage indebtedness and revenue stamps of $11.00 placed thereupon covering $29,000.00.

As to the deed (R2—126), there is an assumption to the Prudential Insurance Company of $28,000.00 (R2—127), $450.00 to the First National Bank of Hattiesburg, $270.00 to the White System of Hattiesburg (R2—128), and $4,000.00 to the Standard Life Insurance Company, of Jackson, Mississippi, upon which deed there are revenue stamps of $14.35. It is perfectly apparent that the grantors were intending to pay revenue stamps upon the only consideration appearing in the deeds, which was the assumption of certain outstanding mortgage indebtedness, from which it necessarily appears that the alleged profit growing out of the three contracts with F. T. Newton and/or Newton and Glenn was an afterthought.

The evidence showed a lawyer by the name of George W. Currie, a previous President of the State Bar Association, drew these deeds, though he has gradually disappeared from this case. It is perfectly apparent that Mr. Currie was of the opinion that the assumption by the grantees of the indebtedness of the mortgage deeds of trust, above referred to, was an adequate consideration though no such contention is made at the present time, from which it appears almost conclusively that the assertion on the part of Mr. and Mrs. Edmonson that the real consideration was $104,000.00 claimed to be due them as members of the family partnership. It is perfectly clear that this was purely an afterthought. At all events there was no consideration whatsoever for the execution of these deeds. The deeds were merely executory gifts.

The contracts were nothing but executory agreements to make a gift and were void under the Mississippi law.

On the question of gifts, the partnership contracts are nothing in the world but executory contracts to make gifts. The giver never delivered the subject of the gift, but the same was always in the possession, or under the control, of the giver, who, as a matter of fact, converted the subject

matter of the gift to his own use. See the case of *Comfort* v. *Smith*, 21 So. (2d) 584; *McClellan* v. *McCauley*, 130 So. 145, 158 Miss. 456; *Marshall* v. *Stratton*, 51 So. 132, 56 Miss. 465; *Woods* v. *Sturgis*, 77 So. 186, 116 Miss. 412, L. R. A. 1918C, 338; *Smythe* v. *Sanders*, 101 So. 435, 136 Miss. 382; *Meyer* v. *Meyer*, 64 So. 420, 106 Miss. 638. It is well settled that there must be a complete execution. An agreement to make a gift, if anything remains to be done, is merely executory and may not be enforced. See C. J. S., Vol. 38, page 793, *et seq.* It is very true that there may be a constructive or symbolic gift, but there must not be a mere contract to deliver, there must be an actual delivery, and here, the only thing the Edmonsons had was the contract to give them certain profits.

(e) *A dividend of partnership property could not be declared in favor of other partners.*

It was claimed by petitioner and her husband that they were members of a subpartnership with Mr. and Mrs. Newton, and that the profits accruing to herself and her husband out of the said partnership amounted to $104,000.00. The facts are undisputed, as will hereinafter appear, that the Newtons owed enormous sums of money to unsecured creditors and that the sureties were called upon, as sureties for Newton & Glenn and Mr. and Mrs. F. T. Newton, to pay large sums of money for labor and material growing out of the various projects. We do not mean to say that there were any claims for labor and material growing out of the particular jobs involved in the three contracts. The property was partnership property and could not be distributed to members of a subpartnership, if any there was. The creditors had a lien thereupon for the payment of their debts. The following cases are directly in point: *Clay* v.

Freeman, 118 U. S. 97; *Hanway* v. *Robertshaw,* 49 Miss. 758; *Robertshaw* v. *Hanway,* 52 Miss. 713; *Meyer* v. *Meyer,* 64 So. 420, 106 Miss. 638; *Wilson* v. *Simmons,* 5 Cir., 270 Fed. 84; D. F. Matheson, an accountant, made up a statement for Newton & Glenn listing the property as partnership property (R. 892-896).

See the very interesting case of *Robinson Bank* v. *Miller,* 153 Ill. 244, 46 A. S. R. 883.

(f) At the time the conveyances complained of were made, the Newtons were in a desperate financial condition.

The fact that the grantors in the conveyance were in an embarrassing financial condition has, in connection with other circumstances, always been regarded as a badge of fraud. The Supreme Court of Mississippi so held in the case of *Reid* v. *Lavecchia,* 193 So. 439, 187 Miss. 413. The same rule is announced in American Jurisprudence, Vol. 24, Section 20.

The evidence is undisputed that Newton had accumulated a very large payroll at Brunswick, Georgia, aggregating $230,000.00, which he was unable to pay. He was in default with subcontractors in the sum of $640,000.00. Paul Mote, the auditor, testified that Newton's liabilities were $2,900,000.00 (R. 152-153) and unsecured claims were proved in the bankruptcy proceeding against Mr. and Mrs. Newton aggregating $2,387,491.32 (R2—821). The Trustee testified undisputedly that he had received and had on hand $22,600.00 (R2—891); that he had received other property appraised at $3,282.00, and the estate would yield very little more than the cost of administration.

(*g*) *The dates of the deeds of conveyance were changed subsequent to their execution, which is a very strong badge of fraud.*

The deeds as placed of record showed that they were executed upon the 23rd day of August, 1943, which would be Monday. The deeds were filed upon the 6th day of October, 1943. Upon the 16th day of October, 1943, they had not even been indexed due to the fact that rumors were in circulation concerning the conveyance of the property; counsel for bank creditors went through the deeds on file in the Chancery Clerk's office and found the three deeds in question. Mr. and Mrs. Newton, Mr. and Mrs. Edmonson, and Mrs. Brannon, the Notary Public, testified that they were executed in Mr. Newton's office upon the 22nd day of August, 1943. Mrs. Edmonson (R. 799); F. T. Newton (R2—353). It was admitted that the 22nd day of August would be Sunday (R2—354. Mrs. Newton (R2—594). The testimony of Mrs. Brannon, Notary Public, and Mr. Edmonson, it is admitted, was to the same effect.

The original deeds are before the Court. It is only necessary that Your Honors examine them from which it undisputedly appears that they were executed upon the 22nd day of some month ending in "ber". In this case it necessarily was September, since the deeds were filed for record prior to the 22nd day of October.

The appellants introduced A. E. Crawford, an expert in the examination of documents. Mr. Crawford examined the original deeds (R2—175-176). He testified that the deeds had been changed from the 22nd day of some month ending in "ber" to the 23rd day of August, 1943. The deeds had been filed upon the 6th day of October, 1943 and recorded upon the 14th of October, 1943. Revenue stamps were

placed thereupon and cancelled upon the 9th day of October, 1943, which was three days after the deeds were filed for record (R2—178).

The District Judge held that the matter wasn't material and that the testimony was insufficient to overthrow the presumption of the acknowledgment on the part of the Notary Public (R2—926). The presumption as to the correctness of the certificate of the Notary Public disappears when Your Honors look at the original deeds from which it is apparent that the date has been changed. The District Judge, however, held that the changing of the date would be immaterial. As to this he is mistaken since it appears that the dates were changed, for we have five witnesses under oath swearing falsely as to the date of the deeds which would completely destroy their testimony for any purpose whatsoever. But not only that: The reason for the changing of the deeds is perfectly apparent. Newton was being crowded for payrolls at Brunswick and for payment on the part of his subcontractors. The bankers were giving evidence of dissatisfaction. Their checks for income taxes for 1942 were dishonored upon September 16. Therefore, it is perfectly apparent that Newton made up his mind prior to September 22, 1943, to go underground, and he proceeded to do so as we have hereinbefore and we shall hereinafter point out. Not only is it apparent and uncontrovertible that the deeds were changed upon their face and back-dated, but it is undisputed that, at the same time, Mrs. Edmonson acquired the real property from the Newtons, she acquired what is known as the Sims note aggregating $3,500.00 which the Receiver testified he had collected, and the transfer of this note, which witnesses say took place at the same time, occurred upon the 22nd day of September, 1943 (R2—458).

We respectfully submit that this transaction in itself

should condemn the conveyances as absolutely fraudulent and void. The evidence established with reasonable certainty that Newton was not even in Hattiesburg on the 23rd day of August, 1943 (R. 1097). It was established almost beyond doubt that he had his automobile repaired in Atlanta, Georgia, on the afternoon of August 23, 1943, for which he paid $47.60 (R. 1138-1140).

(*h*) *The Newtons, having disposed of their real estate, proceeded with equal dispatch to conceal such personal property as was owned by them.*

The District Judge in his findings stated that it was not until after October 16, 1943, that Newton converted and concealed his property (R2—927). In this respect the learned District Judge is in error. Newton's checks were dishonored on September 16th (R. 663-664). He then began to convey away his property, executing the deeds of conveyance complained of upon September 22, 1943, and transferred the Sims note of $3,500.00 at the same time. As appears from the foregoing statement, in the last days of September and the first few days of October, he transferred to Mr. and Mrs. Edmonson approximately $50,000.00 in cash. Not only that, but:

(a) The evidence shows that the sureties employed a firm of auditors, Respess and Respess of Atlanta, Georgia, who sent auditors at once to Hattiesburg to analyze the affairs of F. T. Newton. These auditors remained there with numerous assistants untangling this complicated situation for about nine months. Mr. Mote found numerous accounts on the books of Newton showing persons indebted to him. The books of Newton were checked against the books of the debtors as appeared from Newton's ledger and it was found that they had been paid (R. 1023). The auditors

traced to Mr. and Mrs. Newton the following items which left no track:

October 18, 1943—Check to cash signed by F. T. Newton	$850.00
October 21, 1943—Check signed by Mrs. F. T. Newton	1250.00
October 20, 1943—Check to cash signed by Mrs. F. T. Newton	3500.00
October 21, 1943—Check to cash signed by Mrs. F. T. Newton	3000.00
October 23, 1943—Check to cash signed by Mrs. F. T. Newton	271.92
October 21, 1943—Check to cash signed by Mrs. F. T. Newton	143.83
Total	$9,015.75

of which amount $2,766.91 was used to cover overdrafts. Of the balance, $352.87 was used to take up checks in the office that had been returned, and the difference of $5,895.97 went underground (R. 1046-1047-1048).

Mote testified about checks to J. B. Edmonson, $31,096.15 (R. 1049). Approximately $2,000.00 in checks to deVillentroy (R. 1049). Mr. Mote testified that there went out in cash items, including the money to Edmonson and the money to deVillentroy, $87,347.94 (R. 1049-1059). This fund was all withdrawn, and went under cover, between the 30th day of September and the 5th day of October, 1943.

It will be noted from the foregoing that Newton's checks began to go to protest prior to October 1, 1943.

(i) *Consolidated Construction Company, Inc.—deVillentroy Transaction.*

There was never a more shady transaction revealed in any Court than that which the undisputed testimony establishes in this case in respect to Newton disposing of equipment which he accumulated in his warehouse in Hattiesburg, Mississippi. Newton's auditor, Dumain, testified that upon August 31, 1943, Newton had materials in his warehouse in Hattiesburg aggregating $126,651.02 (R. 1225-1227). His materials on hand in the warehouse at Hattiesburg as shown by his statement of March 31, 1943, was $112,010.00 (R2—337). Newton testified that, as of August 31, 1943, he had materials in the warehouse at Hattiesburg of the value of $126,651.02 (R. 1227). Having disposed of his valuable real estate to Mrs. Edmonson where they thought it would be perfectly safe and within reach, it was necessary that they get rid of this valuable equipment consisting largely of what is known as electrical equipment, because Newton had many contracts where such equipment was required, as well as large quantities of valuable contractors' material. Necessarily the question presented itself to Newton, "How am I going to get this property out of the way?"

Upon the 13th day of October, 1943, John B. Edmonson and Mrs. John B. Edmonson, his wife, the petitioner, and J. B. deVillentroy, the latter as will hereinafter appear being a flunky of Newton's obtained from the State of Mississippi a charter for the Consolidated Construction Company, Inc. (R. 798).

Mr. Wills, attorney for the Newtons and the Edmonsons, testified that he advised Mr. Newton to sell the property to the Consolidated Construction Company (R. 1164).

B. E. Barrett (R. 1121), who lived with his family right next door to the warehouse, testified that large quantities

of material were moved from the warehouse by truck, both in the daytime and at night. Mrs. B. E. Barrett, his wife, likewise testified that, both in the daytime and at night, by means of large trucks, property was hauled away from the warehouse (R. 1124). J. M. Hyche (R. 1423), an employee of Newton's and convicted of selling liquor, states that, at Newton's request, he moved nearly everything out of the warehouse in Hattiesburg and stored the same at New Orleans, Louisiana.

It was Newton's purpose to sell this property to the Consolidated Construction Company, Inc., a corporation incorporated by deVillentroy and the Edmonsons doubtless for no other purpose than to assist Newton in getting rid of the property. We have heretofore made reference to the testimony of the Auditor, Mote, which showed that in excess of $20,000.00, about the 1st of October, 1943, passed from Newton to deVillentroy, the latter being a resident of the city of New Orleans, and the following remarkable statement of facts occurred:

On November 28, 1943, Mr. and Mrs. deVillentroy had an amount in excess of $20,000.00 in their checking and savings account in the American Bank and Trust Company, of New Orleans, Louisiana, subsequently known as the National American Bank of New Orleans. By telegram on the aforesaid date, the New Orleans bank transferred this amount to the First National Bank of Hattiesburg for the account of deVillentroy. Upon December 6, 1943, the First National Bank of Hattiesburg transferred $19,000.00 to the credit of the Consolidated Construction Company, Inc., in the New Orleans bank and, upon that date, deVillentroy took Newton to the New Orleans bank and introduced him to the officers. Newton held a check dated December 6, 1943, payable to himself drawn by the Consolidated Construction Company, Inc., in the amount of $10,236.00. The check contained an endorsement that it was in payment

of equipment sold by Newton to the Consolidated Construction Company, Inc. An officer of the bank o.k.'d the check, and Newton stepped to the window of the paying teller and received ten $1,000.00 bills and $236.00 in small change. In less than ten minutes, deVillentroy at another window deposited to the credit of the Consolidated Construction Company, Inc., ten $1,000.00 bills, and a few days later the difference of $236.00 was placed to the credit of deVillentroy in the First National Bank of Hattiesburg, Mississippi. These facts appear from the testimony of the officers and employees of the National American Bank of New Orleans, Paul Blum (R. 1892), Ralph A. Preston (R. 1901), and Louis Kruser (R. 1904). The exhibits will be found (R. 1907-1909). See also the testimony of W. B. Jones, officer in the First National Bank of Hattiesburg (R2—312-318).

It is very true that these transactions were vigorously denied by Mr. Newton and Mr. deVillentroy but, unfortunately for them, the District Judge couldn't take it. The Court made the following finding (R2—928):

> "A different situation arises, however, as to the conveyance to J. B. deVillentroy, as the testimony is clear and convincing that he had knowledge of the insolvency of Newton, and the conveyances were made without consideration and with the intent to hinder, delay, and defraud creditors. Likewise, the trustee is entitled to recover the sum of $22,000.00 from him, which was paid within the four months prior to November 3, 1943. A decree may be drawn in accordance with this opinion and submitted to me for signing."

The Court further rendered a personal judgment decree against deVillentroy for the sum of $22,000.00 and required him to return the equipment involved in the sale from Newton to the Consolidated Construction Company, Inc., December 6, 1943 (R2—936).

(j) The Totten transaction.

Subsequent to the first day of October, 1943, Newton had at least three uncompleted contracts. Upon each of them, large quantities of electrical equipment was needed. Newton had operated his electric business as Mississippi Electric Company though it belonged to him and was simply a branch of his business. A man by the name of Totten worked for him on a salary. Soon after the first of October, it was necessary that this electric business be carried on for the benefit of the Newtons, so an arrangement was worked out whereby Totten would remove the electrical equipment from the warehouse at Hattiesburg, Mississippi, take it to the various jobs and furnish them with the understanding that Newton was to get the benefit. As a matter of fact, Newton furnished large sums of money therefor. But not only that: Newton needed a go-between as between himself and Totten, so the proof undisputedly shows that Mr. J. B. Edmonson, husband of appellee, Mrs. J. B. Edmonson, consented to act in this capacity for Newton. He thoroughly understood that secretly the Mississippi Electric Company was being conducted by Totten for the benefit of the Newtons, and he permitted the business to be carried on in his name. The Newtons furnished large sums of money and they expected to make a very large sum of money out of it. These transactions were going on pending the application for a Receiver, were kept secret even pending the bankruptcy proceedings. The Newtons never, in their schedules in bankruptcy, accounted for the profits which they received therefrom. The profits went underground and the Newtons still have them. All this is brazenly admitted in the testimony of J. B. Edmonson (R2—509-510-511). It was admitted in the testimony of Mrs. Newton (R2—573, 575, 578, 600-612). Mr. F. T. Newton testified to the same effect. In fact there was no dispute of any character about this

transaction. He testified that Totten hauled away $50,000.00 to $60,000.00 worth of material (R2—753-754).

(*k*) *The property stored on the Turner Place owned by Mrs. Edmonson.*

Having transferred a large portion of the personal property out of the warehouse to New Orleans, and having delivered $50,000.00 to $60,000.00 worth of the property to Totten to be used for the benefit of Newton, there was still some property left in the warehouse. This property was conveyed and stored in a small dwelling situated upon the property conveyed to Mrs. Edmonson in Forrest County. H. H. Rushing (R. 1079), testified that he lived in the neighborhood of the property, and that material was brought from the warehouse in Hattiesburg and stored in a small residence on that farm; that so much of it was stored there it broke the floor down. Bill Mott, a negro living in the same neighborhood (R. 1082), testified to the same facts. He saw material hauled out from Hattiesburg and stored in that small house. After the Receiver was appointed, he took possession of the property which had been stored, and the same was invoiced at $5,200.00 (R. 162).

(*l*) *Property concealed at Newton's home.*

The testimony showed undisputedly that G. M. McWilliams, Trustee, recovered remnants of electric material turned over to him by Totten (R2—892), and he also discovered some building material at Newton's home on the Monroe Road, which was appraised at $3,282.00, found them concealed in Newton's barn covered up with hay (R2—893); describes the material which he found there (R2—893-894). While looking through the hay in Newton's barn, he found an electric drill. He left it there temporarily intending to go back and get it. When he went back to

get it, it had been removed and he saw evidence of fresh automobile tracks on the side of the house (R2—894-895). The net result was that, when the Receiver took charge, he found in the warehouse electrical supplies of the value of $1,000.00 (R2—171). All the remainder of the property had been removed in the manner hereinbefore pointed out.

(*m*) *Part of the real estate rented out to Mrs. Edmonson's brother.*

After the Receiver was appointed, he wished to derive some revenue from the farm known as the Turner Place in Forrest County, conveyed to Mrs. Edmonson. He found that the property was claimed under a five-year lease from H. C. Flurry, who was a brother of Mrs. Edmonson and Mrs. Newton, and he was unable to derive any benefit from the property.

(*n*) *The Samuels transaction.*

At the time Mr. and Mrs. Newton conveyed the property to Mrs. Edmonson, among the properties conveyed was a two-story office building on Front Street. The first floor had been occupied by the Western Union Telegraph Company at a rental of $60.00 per month. Pending the application for a Receivership, a man by the name of Samuels wanted to rent the property– the Western Union was giving it up—so Mrs. Edmonson and her attorney told him he could not have the property unless he paid $125.00 a month for twelve months in advance. He paid $125.00 for the month of December, 1943, and then paid one year's rent, to-wit, the entire year of 1944, in advance. Mr. Samuels paid $1,625.00 in advance to cover the rent from December 1, 1943, to January 1, 1945 (R2—172). This transaction took place pending the application for a Receivership, the money immediately disappeared and was never accounted for to the Receiver.

(o) *F. T. Newton employed and paid Counsel who had entire control of the defense of the litigation.*

The record in this case discloses undisputedly that Mrs. Edmonson and Mr. and Mrs. Newton have appeared by and through the same counsel. Mrs. Edmonson testified that, when the present suit was filed, Mr. Wills so notified her (R. —).

Upon the 20th day of October, which was prior to the time the Government had cancelled Newton's contracts which occurred on the 26th and immediately following the visit of the bankers to Hattiesburg and the discovery of the conveyances to Mrs. Edmonson, Newton contracted with his attorneys to defend Mrs. Edmonson's title to the property. At (R. 764) will be found the stipulation, which contains the following provision:

> "It is further contemplated that in the winding up of the partnership agreements, in which certain real estates in the City of Hattiesburg were conveyed by the said F. T. Newton to Mrs. John B. Edmonson, that litigation will develop over the validity of said transfers.
>
> "Now it is agreed that a fee of $2500.00 is to be charged and paid by the said F. T. Newton to the said T. J. Wills to assist in the litigation over the title of said property. That a fee of $5000.00 on the Brunswick, Georgia, job would be a reasonable fee but taking the twenty-three projects as a whole, it is agreed by and between the said F. T. Newton and T. J. Wills that a fee of $25,000.00 will be paid to assist in the litigation growing out of the twenty-three housing projects and the property litigation which is threatened."

In other words, Mr. and Mrs. Newton not only gave their valuable property to Mrs. Newton's sister, but undertook to defend the transaction. Mrs. Edmonson never had any separate counsel of her own. It is never contended in this

case that she employed or contracted to employ any attorney. This litigation was defended by defendants employed by Mr. and Mrs. Newton, the only parties at interest. This is indeed a "raw" transaction, speaks for itself, and if no other fact were present in the case should condemn the conveyances sought to be set aside. It establishes that Mrs. Edmonson had no real interest in the transaction. She was merely holding the title for Mr. and Mrs. F. T. Newton in order to enable them to defraud their creditors.

(*p*) *Newton's transaction with Dr. Wright.*

Mr. Newton, in his statement of March 31, 1943, showed that he had a $15,000.00 life insurance policy in the New York Life Insurance Company. He was called upon to show what became of it. He testified that he borrowed $10,000.00 upon it from a relative of his by the name of Dr. Wright, in the State of Alabama. This loan was handled just about like the deVillentroy loan in New Orleans (R2—781). While on the stand, Mr. Newton was examined about his borrowing money from Dr. Wright, and from his testimony with exhibits which were introduced, it conclusively appears that Mr. Newton gave Dr. Wright $10,000.00, or a check therefor; that Dr. Wright took the money and delivered it to the bank, and Mr. Newton borrowed it, giving a note payable to Dr. Wright and receiving the same $10,000.00. This appears conclusively (R2—781, 782, 783, 784, 785). In this way, Mr. Newton was able to defraud his creditors of the cash surrender value of the policy.

(*q*) *The delivery of bonds to Reuben T. Newton.*

Reuben T. Newton, a brother of F. T. Newton, as well as T. E. Newton, the father of F. T. Newton, were parties to one of the family profit contracts which have been here-

inbefore referred to. Mrs. Newton had $40,000.00 in government bonds which she had acquired from time to time, but they must get rid of these bonds.

Reuben Newton practiced law in some small town in Alabama. Mrs. Newton testified that she delivered $40,000.00 in bonds to Reuben Newton, her husband's brother (R2—565-566); that she was going to Washington in 1944 to cash the bonds (R2—566-567); that the bonds were redelivered to her by Reuben Newton at the railroad station in Mobile, Alabama, between the 1st and 14th of August, 1944 (R2—568). She states that she went to Washington and cashed the bonds.

Mrs. Newton testified that she met Reuben Newton in Mobile and delivered to him the proceeds of the bonds which she collected from the United States Government. The transactions between Mr. and Mrs. F. T. Newton and the Newton family in Alabama show the grossest fraud, misrepresentation and contradiction. The same is too voluminous to be set out herein but will be found (R. 565-632); the description given by Mr. Reuben Newton of his taking the money from Mrs. F. T. Newton after spending part of it, placed it in a fruit jar which he buried in a post hole in his front yard.

(r) *Retention of Benefits.*

After the delivery of the deeds, the Newtons continued to receive the rents from Mrs. Brannan, the former employee of Mr. and Mrs. Newton. No notice was given to tenants of the change in the title and Mr. F. T. Newton had his offices in the building on Front Street, which he individually occupied without the payment of rent. The District Judge so found (R. 932):

> "The retention of possession is a pregnant circumstance, for it is not a change of possession where the vendee enters into possession jointly with the vendor.

> . . . Possession therefore of land, after an absolute conveyance, is evidence of a fraudulent design within the statute; and if this possession be accompanied with acts of ownership, the evidence of fraud under that statute becomes very hard to be resisted." *Wooten* v. *Clark*, 23 Miss. 75.

Johnston v. *Dick*, 27 Miss. 277. Other authorities are *Arthur* v. *Comm. & R. Bank* (Miss.), 9 S & M. 394; *Wooten* v. *Clark*, 23 Miss. 75.

The foregoing Mississippi authorities hold that this may not be done even for a limited period of time. Even after the appointment of a Receiver, the proof showed that Mrs. Newton visited the office of the Receiver every day, kept in careful touch with the situation, and that Mrs. Edmonson took no interest in the operations.

False Statements Made Commercial Agencies

Statements to sureties and banks did not include the alleged indebtedness to Mr. and Mrs. Edmonson. This was an indication of fraud. *English* v. *Friedman*, 12 So. 252, 70 Miss. 457.

POINT IV

No controversy is presented in this case between the respondent trustee in bankruptcy and petitioner as to the indebtedness, if any, of the Newtons to the bank.

Opposing counsel present the argument that Mr. and Mrs. F. T. Newton were not indebted to the banks, but the banks, by reason of their refusal to make further advances, were indebted to them.

Mr. and Mrs. F. T. Newton were adjudged bankrupts, and such portion of the testimony as is printed is disclosed in the three printed volumes in Cause No. 11,306, United States Circuit Court of Appeals. In that case Mr. and

Mrs. Newton contested the petition of the creditors to have them adjudged bankrupts, assigning, among other reasons, that they were not indebted to the banks in the sum of $1,500,000.00, or any other amount, but that, upon the other hand, the banks, by refusing to make additional advances, had caused them financial damage, and, therefore, the banks were indebted to them and they were solvent. The question as to whether or not the Newtons were indebted was involved in the suit for involuntary bankruptcy and was, necessarily, disposed of by the final decree in that case; otherwise, Mr. and Mrs. Newton would not have been insolvent.

Opposing counsel make extended reference to statements of the District Judge during the trial of the bankruptcy case to the effect that he reserved ruling on the question as to whether or not the indebtedness from the Newtons to the bank was owing. However, after the verdict of the jury was entered, upon a motion for a new trial and directed verdict, the District Judge entered a judgment adjudging Mr. and Mrs. Newton bankrupts. This was a final determination of the controversy and was an adjudication that Mr. and Mrs. Newton were insolvent upon the date of the execution of the instruments involved in this case. The evidence disclosed undisputedly that the Newtons owed the banks approximately $1,500.000.00 (R. 342-343), (R. 1754-1755). Mr. Mote, Certified Public Accountant, who audited the books of the Newtons, listed the notes as liabilities at $1,531,171.89 (R2—147), which, doubtless, included accrued interest. As we have heertofore pointed out, the proven claims filed with the Referee in Bankruptcy in this case aggregated approximately $2,300,000.00, exclusive of cost of administering the estate in bankruptcy (R2—821). Therefore the amount claimed to be owing by the bank or any other creditor in this proceeding was not a matter of inquiry. By agreement of counsel, Mr. Motes's testimony

was not printed (R. 541). There was no evidence in the record upon which any legal damages might have been awarded to Mr. and Mrs. Newton or either of them by reason of the banks' refusal to make further advances. Therefore, the District Judge, upon a re-consideration of the case, on motion for a new trial in the bankruptcy proceedings, doubtless, came to the conclusion that the indebtedness to the banks of approximately $1,500,000.00 was correct, sustained the motion for a new trial, and entered judgment for adjudication.

However, in this case, the question is only most incidentally involved. The Trustee in Bankruptcy, in obedience to the Federal Statutes, filed a suit to set aside the conveyances herein involved. It was the duty of the trustee to claim this property for the benefit of the estate, if the same was fradulently conveyed or if the conveyances constituted a preference. The question of whether or not Mr. and Mrs. Newton were indebted to the banks or the banks were indebted to Mr. and Mrs. Newton was not the determining feature in the case; that question had been settled in the bankruptcy proceedings. The petition of the respondent to intervene will be found (R2 47). The answer of the petitioner thereto will be found (R2—64). The question as to whether or not Mr. and Mrs. Newton were indebted to the banks was not mentioned in the pleadings. It is very true that in the trial of the present suit of the trustee to set aside the conveyances, the three volumes of testimony including the testimony in the bankruptcy trial, were introduced. They were introduced, however, not because of any controversy as to whether Mr. and Mrs. Newton owed the banks; that question was, necessarily, adjudicated in the bankruptcy decree. The bankruptcy record in Cause No. 11,306 was introduced primarily because the testimony tended to show fraud on the part of the parties to the conveyances and was relevant upon the question as

to whether or not preference was had. The question as to whether or not the Newtons were indebted to the banks was not the determining question, and, therefore, not involved in the pleadings, and, accordingly, has no place in this record. *Reynolds* v. *Stockton*, 11 S. C. 773, 140 U. S. 34, 35 L. Ed. 464; *Kelly* v. *Benton* (C. C. A.) 149 F. 466; *Wagoner National Bank* v. *Welch* (C. C. A.) 164 F. 813; *Dietrick* v. *Standard Surety & Casualty Co.*, 90 F. 2d 862, affirmed 303 U. S. 471, 82 L. Ed. 962, rehearing denied 304 U. S. 588, 82 L. Ed. 1548; *Osage Oil & Refining Co.* v. *Cotton Oil Co.* (C. C. A.), 44 F. (2d) 585; *Webster Eishler, Inc.* v. *Kay Loardner*, 141 F. 2d 316, certiorari denied 325 U. S. 867.

We respectfully submit that the application for certiorari both on the original and the amended petition should be denied because:

(1) The issue involved in this case may not be confined merely to the execution and delivery to the petitioner of the deeds of conveyance shown. Upon the other hand, it conclusively appears that the delivery of such deeds was but one step, and a carefully prepared device to place the property of Mr. and Mrs. Newton beyond the reach of their creditors. This case presents the most conspicuous instance of an attempt on the part of the debtors to defraud their creditors exhibited in American jurisprudence.

(2) Every badge of fraud known to the law, as well as numerous others never before conceived, are present in this case. Any finding that petitioner was free from fraud was unreasonable.

(3) The petitioner does not claim that the deeds executed may be based on any other consideration than the family partnership shown by this record. The District Judge expressly found that the agreement was one made to diminish the income taxes payable, thereby separating the

fruit from the tree. This finding has been concurred in by the Circuit Court of Appeals.

Respectfully submitted,

WILLIAM H. WATKINS, *Amicus Curiae,*
Attorney for Maryland Casualty Company and National Surety Corporation, Surety Creditors of Mr. and Mrs. F. T. Newton, Bankrupts.

Certificate

I, WILLIAM H. WATKINS, of counsel for the Maryland Casualty Company and the National Surety Corporation, Surety Creditors of the Bankrupts, Mr. and Mrs. F. T. Newton, certify that I have this day sent by United States Mail, postage prepaid, to Wilkinson & Skinner, Birmingham, Alabama, and to T. J. Wills, Hattiesburg, Mississippi, Attorneys for Petitioners, a true copy of the above and foregoing brief.

This, the 18th day of November, 1947.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX I

Section 1327, Mississippi 1942 Code: *Creditors May Attack Fraudulent Conveyances, etc.*—The said court shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, whether their debts be due or not, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors as if complainants had judgments and execution thereon returned "no property found." Upon such a bill a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs; and the chancellor of the proper district shall have power and authority to grant orders for receivers, in same manner as if the creditor had recovered judgment and had execution returned "no property found." The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill.

APPENDIX II

Section 265, Mississippi 1942 Code: *Fraudulent Conveyances.*—Every gift, grant, or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any rent, common or other profit or charge out of the same, by writing or otherwise; and every bond, suit, judgment, or execution had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenants, or hereditaments, or any rent, profit, or commodity out of them, shall be from henceforth deemed and taken only

as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them whose debts, suits, demands, estates, or interests by such guileful and covinous devices and practices shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

And moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this statute, unless the same be by will duly proved and recorded, or by writing acknowledged or proved; and such writing, if the same be for real estate, shall be acknowledged or proved and filed for record in the county where the land conveyed is situated, and, if for personal property, then in the county where the donee shall reside or the property shall be; and the proof or acknowledgment in either case shall be taken or made and certified in the same manner as conveyances of lands and tenements are by law directed to be acknowledged or proved, unless, in the case of personal property, possession shall really and bona fide remain with the donee.